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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 19

BRADLEY W. PALMER, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR CERTIORARI FILED MARCH 31, 1937.

CERTIORARI GRANTED MAY 17, 1937.

No. 59

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

vs.

BRADLEY W. PALMER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MAY 12, 1937.

CERTIORARI GRANTED JUNE 1, 1937.

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[fol. 1] [Caption omitted]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 62652

BRADLEY W. PALMER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances.

For Taxpayer: Francis V. Barstow, Esq., A. Mitchell Palmer, Esq., Wm. D. Harris, Esq.

For Commissioner: F. R. Shearer, Esq., Edward L. Updike, Esq.

DOCKET ENTRIES.

1932.

Mar. 9. Petition received and filed. Taxpayer notified. (Fee paid)

" 10. Copy of petition served on General Counsel.

May 10. Answer filed by General Counsel.

" 23. Copy of answer served on taxpayer. General Calendar.

1933.

Mar. 28. Hearing set April 27, 1933.

[fol. 2]

Apr. 5. Motion for 90 days continuance filed by taxpayer. 4/6/33 continued to Fall Calendar of 1933.

" 22. Hearing set Jan. 23, 1934—Revised notice of hearing Feb. 28, 1934.

" 29. Motion to set for hearing on Feb. 28, 1934 filed by taxpayer. 1/3/34 granted.

" 29. Notice of appearance of A. Mitchell Palmer and Wm. D. Harris as counsel filed.

1934.

Feb. 19. Motion for continuance to March 22, 1934 filed by taxpayer. 2/26/34 granted.

Mar. 8. Motion for leave to amend petition, amendment tendered, filed by taxpayer. 3/9/34 granted.

" 13. Copy of motion and amended petition served on General Counsel.

" 17. Motion for continuance to April 4, 1934 filed by taxpayer. 3/19/34 granted.

DOCKET ENTRIES—Continued

1934.

Apr. 3. Answer to amended petition filed by General Counsel.

" 4. Hearing had before Mr. Smith, Div. 5 on merits. Petitioner allowed 15 days to file reply to amended answer. Stipulation of facts filed. Petitioner's brief due 10 days (4/14/34) Commissioner's brief due in 30 days (5/14/34) Oral argument to be had on May 21, 1934.

" 4. Copy of answer to amended petition served on taxpayer.

" 6. Transcript of hearing of April 4, 1934 filed.

" 16. Motion for extension to April 20, 1934 to file reply and brief filed by taxpayer. 4/17/34 granted. Commissioner allowed to 5/21/34 to file brief.

" 20. Brief filed by taxpayer. 4/21/34 copy served.

" 20. Reply to amended answer filed by taxpayer. 4/21/34 copy served.

May 21. Hearing had before Mr. Leech, Div. 6 on oral argument. Continued to June 4, 1934. Commissioner allowed to May 23, 1934 to file brief.

" 21. Order allowing Commissioner to May 23, 1934 to file brief and to continue proceedings to June 4, 1934 entered.

[fol. 3]

May 23. Order granting Commissioner to May 24, 1934 to file brief entered.

" 24. Motion to continue hearing to June 14, 1934 filed by taxpayer. 5/25/34 granted.

May 24. Brief filed by General Counsel.

Jun. 11. Motion to continue hearing to Oct. 10, 1934 filed by taxpayer. 6/12/34 granted.

Oct. 3. Order to place on calendar of Oct. 17, 1934 entered.

17-18-19. Hearing had before Mr. Smith (Matthews) (Arundell) on oral argument. Appearance of A. Mitchell Palmer, Wm. D Harris and Francis V. Barstow. No briefs due.

Nov. 20. Transcript of hearing of Oct. 17, 18 & 19 filed.

1935.

Apr. 30. Opinion rendered Mr. Smith, Div. 5. Judgment will be entered under Rule 50.

DOCKET ENTRIES—Continued

1935.

Jun. 21. Order to modify opinion promulgated April 30, 1935 entered.
Jul. 3. Notice of settlement filed by General Counsel.
" 5. Hearing set July 24, 1935 on settlement.
" 24. Hearing had before Mr. Trammell, Div. 2 on settlement. Not contested. Referred to Mr. Smith. Div. 5 for decision.
" 25. Decision entered, Mr. Black, Div. 15.
Oct. 16. Petition for review by U. S. Circuit Court of Appeals (1) with assignments of error filed by General Counsel.
" 31. Proof of service filed by General Counsel. (2)
Nov. 25. Præcipe filed.
Dec. 3. Proof of service of præcipe filed.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED PETITION—Filed March 9, 1934

The above named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:B-1 [fol. 4] —F. J. G.-60D) dated February 12, 1932, and as a basis of his proceedings alleges as follows:

(I) The address of the petitioner is 53 State Street, Boston, Massachusetts.

(II) The notice of deficiency, a copy of which is attached hereto marked "Exhibit A" was mailed to the petitioner on February 12, 1932, as the petitioner believes.

(III) The taxes in controversy are income taxes for the year 1929. The deficiency asserted is $33,381.03, all of said amount being in dispute.

(IV) The determination of the tax as set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erroneously disallowed as a capital net gain the amount received from the sale of stock

rights received in respect of stock held by him more than two years because the petitioner included in his return the entire proceeds from the sale of the said rights and did not prorate the cost of the basic stock between the said stock and the said rights.

(b) The Commissioner erred in adding to the amount of taxable dividends reported by the petitioner the sum of $160,115.50 on account of the issue to the petitioner by The American Superpower Corporation of purchase certificates or rights to purchase shares in The United Corporation and The Commonwealth & Southern Corporation.

(c) The Commissioner also erred in adding to the amount of taxable dividends reported by the petitioner the sum of $135,115.50 on account of the issue to the petitioner by The American Superpower Corporation of purchase certificates or rights to purchase shares of The United Corporation, because the distribution to the petitioner of the said rights and of the shares acquired by him thereunder, was a tax free distribution under the Revenue Act of 1928.

(V) The facts upon which the petitioner relies are as follows:

(a) (1) The petitioner listed in his return for 1929 schedule D relating to capital gains the sale of stock rights as follows:

[fol. 5]

Kind of Property	Date Acquired	Date Sold	Receipts	Costs	Profits
Int. Tel. & Tel. Co. Rights 1125	Various dates from May 9/23 to Aug. 31/25	1/10/29	$5,143.75	0	$5,143.75
Elec. Bond & Share 2358	Jan. 31, 1925	Aug. 2–6/29	22,216.25	0	22,216.25

No cost price was taken for the said rights relying upon that part of article 58 of the Regulations 74 relating to the Income Tax under the Revenue Act of 1928 which states:

"The taxpayer may at his option include the entire proceeds from the sale of stock rights in gross income in which case the basis for determining gain or loss from the subsequent sale of the stock in respect of which the rights were issued shall be the same as though the rights had not been issued."

Petitioner says this amount was properly taxable as a capital gain and not as ordinary income.

(b) (1) On or about January 25, 1929, your petitioner received from The American Superpower Corporation (hereinafter referred to as Superpower) a communication dated January 24, 1929, copy of which is hereto annexed, marked "Schedule 1". The said communication was authorized by action of the board of directors of Superpower at a meeting held on January 23, 1929, a complete copy of the minutes of said meeting being set forth in Schedule 2.

(2) Later, on or about February 1st, the petitioner received from Superpower a purchase certificate, (a copy of which is hereto annexed in Schedule 3) which covered the right to acquire according to the terms thereof 3,198 shares of United Corporation at $25 a share, to wit, the right to acquire at the said price one share of United Corporation for each two shares of Superpower common stock (both Class A and Class B) held by petitioner at the close of business January 26, 1929. On or before February 15, 1929, petitioner paid to Superpower $79,950 in cash and surrendered the purchase certificate which he had received from Superpower and received therefor 3,198 shares of United Corporation.

(3) On or about May 3, 1929, the petitioner received from Superpower a communication dated May 2, 1929, copy [fol. 6] of which is hereto annexed, marked Schedule 4. The said communication was authorized by action of the Board of Directors of Superpower taken on May 1, 1929, copy of which is set forth in Schedule 5.

(4) Later, on or about May 9, 1929, petitioner received from Superpower a communication dated May 8, 1929, (copy of which is set forth in Schedule 6) enclosing a purchase certificate (a copy of which is set forth in Schedule 7) which covered the right to acquire according to the terms thereof 1,599 shares of United Corporation at $30 a share, to wit, the right to acquire at the said price one share of United Corporation for each four shares of Superpower common stock (both Class A and Class B) held by petitioner at the close of business May 8, 1929. On or before May 24, 1929, petitioner paid to Superpower $47,970 in cash and surrendered the purchase certificate which he had received from Superpower and received therefor 1,599 shares of United Corporation.

(5) On or about June 6, 1929, the petitioner received from Superpower a communication dated June 5, 1929, copy of which is hereto annexed, marked "Schedule 8". The said communication was authorized by action of the Board of Directors of Superpower taken on June 5, 1929, copy of which is set forth in Schedule 9.

(6) Later, on or about June 22nd, petitioner received from Superpower letter dated June 22, 1929 (a copy whereof is set forth in Schedule 10), enclosing purchase certificate, (a copy of which is hereto annexed in Schedule 11) which covered the right to acquire according to the terms thereof 3,200 shares of Commonwealth & Southern Corporation at $15 a share, to wit, the right to acquire at the said price one share of Commonwealth & Southern for each ten shares of Superpower common stock held by petitioner at the close of business on June 18, 1929. On or before July 2, 1929, petitioner paid to Superpower $48,000 in cash and surrendered the purchase certificate which he had received from Superpower and received therefor 3,200 shares of Commonwealth & Southern Corporation.

(7) The 3,198 shares of United Corporation acquired by the petitioner from Superpower on February 15, 1929, were carried on the books of Superpower at the cost of $8.84 per share. Upon receipt of payment therefor by the petitioner, Superpower placed on its books profit from the [fol. 7] said sale to the petitioner of $16.16 per share, to wit, a profit of $51,679.68.

(8) The 1,599 shares of United Corporation acquired by the petitioner from Superpower on May 24, 1929, were carried on the books of Superpower at the cost of $8.84 per share. Upon receipt of payment therefor by the petitioner, Superpower placed on its books profit derived from the said sale to the petitioner, of $21.16 per share, to wit, a profit of $32,235.84.

(9) The 3,200 shares of Commonwealth & Southern Corporation acquired by the petitioner from Superpower on February 15, 1929, were carried on the books of Superpower at the cost of $14.133 per share. Upon receipt of payment therefor by the petitioner, Superpower placed on its books profit from the said sale to the petitioner of 86 cents per share, to wit, a profit of $2,752.

(10) The earned surplus of Superpower on the several dates specified below was as follows:

Dec. 31, 1928	$7,229,520.87
Jan. 26, 1929	7,862,508.98
Apr. 30, 1929	21,311,564.38
May 8, 1929	22,100,642.69
May 31, 1929	29,987,020.00
June 18, 1929	30,101,123.69
Dec. 31, 1929	38,591,246.59

which included the following amounts received from its shareholders and their assignees upon the exercise of the above mentioned purchase certificates on the following dates, to wit:

	No. of shares sold		Profit
Feb. 15, 1929	821,472	(United Corp.)	$13,152,537.43
May 24, 1929	410,504	" "	8,625,074.18
June 18, 1929	824,231	(Com. & So.)	712,170.49
Total			$22,489,782.10

(11) Superpower, on its books or otherwise, made no charge against or deduction from its accumulated earnings or profit, nor from its surplus or any of its assets, on account or as a result of the said issues of purchase certificates.

[fol. 8] (12) The Commissioner placed a value on the rights granted by the purchase certificate issued on January 25, 1929, of $12.50 for each right as of the date of issue. The total number of the said rights was 1,643,576 and the total value thereof as determined by the Commissioner was $20,544,700; and of these rights, 1,642,944 were exercised of which the total valuation so determined was $20,536.800.

(13) The Commissioner placed a value on the rights granted by the purchase certificate issued on May 8, 1929, of $8.625 each as of the date of issue. The total number of the said rights was 1,643,576 and the total value thereof as determined by the Commissioner was $14,175,843; and of these rights, 1,642,016 were exercised of which the total valuation so determined was $14,162,388.

(14) The Commissioner placed a value on the rights granted by the purchase certificate issued on June 18, 1929,

of $.78⅛ for each right as of the date of issue. The total number of the said rights was 8,243,000 and the total value thereof as determined by the Commissioner was $6,439,-843.75; and of these rights, 8,237,480 were exercised, of which the total valuation so determined was $6,435,531.25.

(15) By reason of the facts aforesaid, your petitioner says that the issuance of said purchase certificates were not in fact or in law, dividends or taxable as such.

(c)(1) On January 9, 1929, the board of directors of Superpower held a meeting, a copy of the full minutes whereof is set forth in Schedule 12. Thereupon, Superpower and United Corporation entered into a written agreement dated January 9, 1929 (Attached hereto as Schedule 13) to which they were the sole original parties, and which provided substantially as follows:

(2) Superpower agreed to organize Public Electric Holding Corporation (hereinafter called the Holding Corporation) with a capital stock of 10,000 shares, for the purpose of transferring and delivering to Holding Corporation.

800,000 shares of common stock of Public Service Company of New Jersey, and
53,000 shares of common stock of United Gas Improvement Company (with $25.00)

[fol. 9] in consideration of the issue and delivery to Superpower of the entire stock of Holding Corporation.

(3) United agreed to merge and consolidate with Holding Corporation under the laws of Delaware into one consolidated corporation to be known as the United Corporation. By the terms of such merger and consolidation, the capital stock of Holding Corporation, then held by Superpower, was to be converted into

344,187 shares of $3.00 cumulative preference stock,
2,210,853 shares of common stock, and
1,000,000 shares of common stock option warrants,

all of United Corporation, the legal successor of Holding Corporation and United Corporation.

(4) On January 10, 1929, Superpower organized Holding Corporation and, on the same day, the Holding Cor-

poration issued all of its common stock to Superpower upon receiving assignments of the shares of Public Service Corporation and United Gas Improvement Company (plus $25.00). Accordingly, Superpower had transferred a part of its assets to Holding Corporation and, immediately after the transfer, was in control of Holding Corporation by the ownership of all of the stock of Holding Co. Petitioner claims this reorganization came within the definition stated in the Revenue Act of 1928, Section 112 (i), (1), (B).

(5) On January 11, 1929, United Corporation and Holding Corporation were merged and consolidated, and United Corporation acquired all the properties of Holding Corporation. Petitioner claims this organization came within the definition stated in Sec. 112 (i), (1), (A).

(6) The original parties to the reorganization were Superpower and United Corporation. The Holding Corporation became a party thereto under Sec. 112 (i), (2). Also upon the merger and consolidation of United Corporation and Holding Corporation, United Corporation became the legal successor to Holding Corporation under the laws of Delaware, and took its place as a party to the reorganization.

(7) It was understood and agreed that in pursuance of the plan of reorganization a part of the shares of United [fol. 10] Corporation so received by Superpower should be distributed by Superpower to its shareholders. And such distributions were ordered by Superpower on January 23 and May 1, 1929.

(8) Petitioner claims this distribution was made pursuant to a plan of reorganization, to the shareholders of Superpower, party to the reorganization, of shares of stock (through rights) in the United Corporation, another corporation, party to the reorganization, without surrender of any stock or securities, by such shareholders, and no gain to the taxpayer could be recognized thereby. Sec. 112 (g).

(9) Your petitioner avers that neither the issue of said purchase certificates nor the acquisition of said rights was taxable.

(VI) Wherefore, the petitioner prays that this Board may hear the proceedings and determine that the peti-

tioner had a right to return as a capital gain the entire amount received from the sale of the said rights issued to him as owner of shares in The International Telephone and Telegraph Company and the Electric Bond & Share Company, that the rights issued by The American Superpower Corporation to subscribe to shares of The United Corporation and to shares of The Commonwealth & Southern Corporation were not dividends and therefore not taxable as such, and that said shares of United Corporation were distributed in pursuance of a plan of reorganization as defined in the Revenue Act of 1928, and not taxable; and that the Commissioner be required to make a redetermination of petitioner's tax liability in accordance therewith, and for such other and further relief as this Board may find to be meet and proper.

Bradley W. Palmer, 735 Exchange Building, Boston, Mass. A. Mitchell Palmer, Wm. D. Harris, Attorneys for Taxpayer.

Duly sworn to by Bradley W. Palmer. Jurat omitted in printing.

[fol. 11] EXHIBIT "A" TO AMENDED PETITION

MP-2-28

Treasury Department

Office of Commissioner of Internal Revenue

Washington, Feb. 12, 1932.

Mr. Bradley Webster Palmer, 53 State Street, Boston, Massachusetts.

SIR:

You are advised that the determination of your tax liability for the year(s) 1929 discloses a deficiency of $33,381.03, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier: Whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully, David Burn Commissioner, by J. C. Wilmer, Deputy Commissioner.

Enclosures: Statement. Form 882. Form 870.

[fol. 12] Statement

IT:AR:B-1. FJG-60D.

In re Mr. Bradley Webster Palmer, 53 State Street, Boston, Massachusetts

Tax Liability

Year	Tax Liability	Tax Assessed	Deficiency
1929	$7,346.49	$37,965.46	$33,381.03

The report of the internal revenue agent in charge, Boston, Massachusetts, covering an investigation of your tax liability for the year indicated, has been reviewed and approved with the following exception:

The examining officer included in the income taxable as capital net gain, $27,360.00 representing the sale price of Electric Bond and Share and International Tel. and Tel. rights. The following statement was made in the report:

"Taxpayer does not wish to recompute gain on sale of Electric Bond and Share Company rights of International Tel. and Tel. Company rights because of complications in arriving at adjusted cost."

This office holds that inasmuch as the cost of the basic stock was not prorated, the total selling price should be taxed at ordinary rates.

Adjustment of your return, upon this basis, discloses a deficiency in tax of $33,381.03, determined as follows:

Ordinary net income as shown in revenue agent's report		$219,165.57
Capital net gain (revenue agent's report)	$272,171.00	
Add:		
Profit transferred from capital net gain to ordinary net income		27,360.00
Adjusted ordinary net income		$246,525.57
Capital net gain revised—$272,171.00–$27,360.00		$244,811.00

Computation of Tax

Adjusted ordinary net income		$246,525.57
[fol. 13] Less:		
Dividends	$270,625.00	
Personal exemption	1,500.00	
		272,125.00
Income subject to normal tax		None
Surtax on $246,525.57		40,965.11
Tax at 12½% on capital net gain of $244,811.00		30,601.38
Total		$71,566.49
Less:		
Earned income credit		220.00
Total tax assessable		$71,346.49
Tax previously assessed		37,965.46
Deficiency in tax		$33,381.03

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1929, the Income Tax Unit will be unable to afford you an opportunity to discuss your case before mailing formal notice of its determination as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this notice of deficiency.

Schedule 1

The American Superpower Corporation, 19–21 Dover Green Dover, Delaware

January 24, 1929.

To the Stockholders of The American Superpower Corporation:

GENTLEMEN:

At a special meeting of the Board of Directors of The American Superpower Corporation held January 23, 1929, the Board voted to grant to the Common Stockholders of The American Superpower Corporation of record at the close of business on January 26, 1929, the right to purchase from it shares of the Common Stock of The United Corporation at $25 per share at the rate of one share of The United Corporation stock for each two shares of American [fol. 14] Superpower Corporation Common Stock (both Class A and Class B (held on the said close of business on January 26, 1929.

These rights to purchase will expire on the 15th day of February, 1929. Purchase Certificates evidencing the above purchase privilege will be mailed to stockholders of The American Superpower Corporation on or about February 1, 1929.

You were informed a few days ago of the transaction by which The American Superpower Corporation transferred to The United Corporation the holdings of The American Superpower Corporation in the stock of the Public Service Corporation of New Jersey and the United Gas Improvement Company in exchange for a substantial interest in the securities of The United Corporation. The stock of The United Corporation which will be offered to the stockholders of The American Superpower Corporation, as above stated, is part of the stock so received. The American Superpower Corporation is retaining the major portion of its interest in The United Corporation.

Yours very truly, E. G. Strand, Secretary.

Schedule 2

I, Earnest G. Strand, Secretary of The American Superpower Corporation, do hereby certify that the following is

a full, true and complete copy of the minutes of a meeting of the Board of Directors of said Corporation held on the 23rd day of January, 1929:

"Minutes of a special meeting of the Board of Directors of The American Superpower Corporation, held at the office of Bonbright & Company, Incorporated, No. 25 Nassau Street, Borough of Manhattan, City of New York, on the 23rd day of January, 1929.

Present: Messrs. Alfred L. Loomis, Landon K. Thorne, Horace S. Scarritt, George Roberts, George E. Hardy, Sidney Z. Mitchell, R. P. Stevens, B. C. Cobb, William Spencer Murray, Francis B. Thorne.

Absent: Messrs. T. B. Macaulay, Richard Schaddelee, Thomas N. McCarter, Percy S. Young, William W. Bodine.

being all of the Directors of the Corporation.

[fol. 15] Mr. Loomis presided at the meeting and Mr. Roberts acted as Secretary thereof.

The minutes of the last meeting of the Board of Directors held on the 9th day of January, 1929, and the minutes of the meeting of the Executive Committee held on the 17th day of January, 1929, were read and, on motion duly made and seconded, it was unanimously

Resolved, That the minutes of the meeting of the Board of Directors held on the 9th day of January, 1929, be approved; and

Further resolved, That the minutes of the meeting of the Executive Committee held on the 17th day of January, 1929, be approved and that the action therein taken as ratified as the action of this Board.

There was presented to the meeting an informal and condensed balance sheet of the Corporation, as of the 21st day of January, 1929, together with a schedule showing securities owned. Thereupon, on motion duly made and seconded, it was unanimously

Resolved, That the said balance sheet and the schedule of securities owned be approved; and

Further resolved, That the changes made in investments by the officers of the Corporation since the last meeting of the Board of Directors be ratified, approved and confirmed.

The Chairman stated that the Agreement of January 9th, 1929, between The American Superpower Corporation and The United Corporation, authorized by the meeting of the Board of Directors held on January 9th, 1929, had been carried out, and that The Public Electric Holding Corporation had been incorporated and merged into The United Corporation and that The American Superpower Corporation, in return for its stock holdings in The Public Electric Holding Corporation, had received securities of The United Corporation as follows:

344,187 shares of $3 Cumulative Preference Stock;
2,210,853 shares of Common Stock;

[fol. 16] Option Warrants to Purchase

1,000,000 Shares of Common Stock at $27.50 per Share

The Chairman presented to the Board, for its consideration, a proposal to offer to Common Stockholders of this Corporation the privilege of purchasing Common Stock of The United Corporation owned by this Corporation—thus securing a wide distribution of the Common Stock of The United Corporation and, at the same time, materially improving the cash position of The American Superpower Corporation. He suggested that the offering price of the Common Stock of The United Corporation be Twenty-five ($25) Dollars per share, and that the holders of Class A and Class B Common Stock of this Corporation be entitled to purchase one-half (½) a share of the Common Stock of The United Corporation for every share of Class A and Class B Common Stock held in this Corporation. He presented to the meeting forms of a Purchase Certificate and Fractional Purchase Certificate to be sent to Class A and Class B Common Stockholders of this Corporation.

After discussion, on motion duly made and seconded, it was unanimously

Resolved, That The American Superpower Corporation offer to the holders of Class A and Class B Common Stock, at the close of business on January 26th, 1929, the privilege of purchasing full shares of Common Stock of The United Corporation owned by this Corporation at Twenty-five ($25) Dollars per share and at the rate of one-half (½) a share of Common Stock of The United Corporation for

every share of Class A and Class B Common Stock standing in the names of such holders on said date; and

Further resolved, That the forms of Purchase Certificates and Fractional Purchase Certificates submitted to this meeting be and they hereby are approved; and

Further resolved, That copies of said forms of Purchase Certificates and Fractional Purchase Certificate, in the form in which submitted to this meeting, be attached to the minutes hereof; and

[fol. 17] Further resolved, That the proper officers of this Corporation be and they hereby are authorized to make arrangements for the preparation of Purchase Certificates and Fractional Purchase Certificates in the proper quantities, and to arrange with Central Union Trust Company of New York, as Agent for this Corporation, to mail to the holders of Class A and Class B Common Stock of this Corporation, at the close of business on January 26th, 1929, Purchase Certificates and Fractional Purchase Certificates, signed by Central Union Trust Company of New York, Agents; to accept the surrender of the Purchase Certificates and Fractional Purchase Certificates and the payments made as provided for therein; and to issue, upon such surrender and payment, the Common Stock of The United Corporation to which the holders of such Purchase Certificates and Fractional Certificates had become entitled; and

Further resolved, That the proper officers of this Corporation be, and they hereby are, authorized to deposit with the Transfer Agent of The United Corporation certificates for Common Stock of The United Corporation owned by this Corporation, representing the total number of shares called for by the Purchase Certificates and Fractional Purchase Certificates to be mailed to Stockholders of record at the close of business on January 26th, 1929, such certificates to be endorsed in blank with the proper Federal and New York State documentary stamps affixed and cancelled, and to instruct said Transfer Agent to transfer such stock on the books of The United Corporation and to issue certificates in such names and such denominations as may be requested by the written order of Central Union Trust Company of New York, Agent; and

Further resolved, That the proper officers of this Corporation be, and they hereby are, authorized to do any and all things in connection with the offer to Common Stockholders

of this Corporation of the privilege of purchasing Common Stock of The United Corporation which, to such officers, shall seem necessary or convenient."

[fol. 18] The Chairman presented to the meeting a proposed form of public announcement in regard to the offer to Stockholders above referred to, which form was duly approved.

There was then presented to the meeting an offer from Bonbright & Company, Incorporated, as follows:

"January 23rd, 1929.

"The American Superpower Corporation, Dover, Delaware.

"GENTLEMEN:

"We hereby offer to sell, transfer and deliver to you Thirty-seven Thousand, Five Hundred (37,500) shares of the Class B (Voting) Common Stock and Seventy-Six Thousand, Two Hundred Sixty-one (76,261) Reversionary Certificates of Italian Superpower Corporation, a corporation organized under the Laws of the State of Delaware, in exchange for Twelve Thousand (12,000) shares of the Class A Common Stock of The American Superpower Corporation, to be delivered to and in the name of A. P. Taliaferro. This offer will remain open until the close of business on January 25th, 1929.

"If this offer is accepted by you, please so indicate in the space provided below, thus constituting this a contract between us.

"We enclose herewith, for your information, a copy of the Charter and By-Laws of Italian Superpower Corporation and a copy of an informal balance sheet stating the assets and liabilities of Italian Superpower Corporation as of December 31st, 1928; also a list of securities owned as of December 31st, 1928, with the cost price and market price as of December 31st, 1928, and a statement of earnings and expenses from the beginning of business on January 1st, 1928, to the end of business on December 31st, 1928.

"Very truly yours, Bonbright & Company, Incorporated, by —— ——, Vice-President."

We accept the above offer.

Dated January —, 1929.

The American Superpower Corporation, by —— ——, Vice-President.

[fol. 19] Mr. Loomis stated that he, Mr. Thorne, Mr. Scarritt and Mr. Roberts were officers and Directors of Bonbright & Company, Incorporated, and that they, therefore, would take no part in the consideration of the above offer except to answer inquiries made by any Director. It appeared, based on current market quotations for the Class B Voting Common Stock and Reversionary Certificates of Italian Superpower Corporation and the current market quotations for Class A Common Stock of The American Superpower Corporation, that the offer of exchange was based on figuring the securities of Italian Superpower Corporation at less than their current market price and the securities of The American Superpower Corporation slightly in excess of current market prices. Mr. Mitchell and Mr. Cobb both stated that they were Directors of Italian Superpower Corporation and that they thought the exchange proposed was fair and advantageous to The American Superpower Corporation. Mr. Hardy also spoke in favor of accepting the offer.

After further discussion, on motion duly made and seconded (Messrs. Loomis, Thorne, Scarritt & Roberts not voting) it was unanimously

Resolved, That the offer of Bonbright & Company, Incorporated, to exchange Thirty-seven Thousand, Five Hundred (37,500) shares of Class B Voting Common Stock and Seventy-six Thousand, Two Hundred Sixty-one (76,261) Reversionary Certificates of Italian Superpower Corporation for Twelve Thousand (12,000) shares of Class A Common Stock of The American Superpower Corporation, as described in the letter of Bonbright & Company, Incorporated, dated January 23rd, 1929, be accepted, and that the proper officers of this Corporation be and they hereby are instructed to execute and deliver an acceptance of said offer and to do all things necessary or advisable to carry into effect said exchange; and

Further resolved, That this Corporation issue and deliver to A. P. Taliaferro, as contemplated in said offer of Bonbright & Company, Incorporated, Twelve Thousand (12,000) shares of Class A Common Stock of this Corpora-
[fol. 20] tion, and that the Transfer Agent and Registrar be and they hereby are authorized and directed to countersign and register said shares; and

Further resolved, That, upon receipt of the said stock and Reversionary Certificates of Italian Superpower Corporation, the said Twelve Thousand (12,000) shares of Class A Common Stock of The American Superpower Corporation be full paid and non-assessable.

After discussion, it developed that Field, Glore & Co. also owned Thirty-seven Thousand, Five Hundred (37,500) shares of the Class B Voting Common Stock and a substantial number of Reversionary Certificates of Italian Superpower Corporation. It was the sense of the meeting that it would be to the advantage of The American Superpower Corporation to acquire these holdings, if possible, on comparable terms with the acquisition of Bonbright & Company, Incorporated.

Thereupon, on motion duly made and seconded, it was unanimously

Resolved, That the proper officers of this Corporation be and they hereby are authorized to make an offer to Field, Glore & Co. to acquire the Class B Voting Common Stock and Reversionary Certificates of Italian Superpower Corporation held by Field, Glore & Co. in exchange for Class A Common Stock of The American Superpower Corporation, on the same or similar basis as the contract with Bonbright & Company, Incorporated; and

Further resolved, That, should said offer be accepted, the proper officers of this Corporation be and they hereby are authorized to issue and deliver to Field, Glore & Co. the amount of Class A Common Stock necessary to effect said exchange, and said stock, when so issued, shall be full paid and non-assessable.

Mr. Mitchell then stated that the Electric Investors, Inc., of which he was President, owned Six Thousand, Nine Hundred Eighty-two (6,982) shares of Class A Common Stock of Italian Superpower Corporation which it would be [fol. 21] willing to turn in to The American Superpower Corporation in exchange for Class A Common Stock of The American Superpower Corporation. After a discussion, it appeared reasonable to treat the Class A Common Stock of Italian Superpower Corporation as having a fair value, for the purpose of this exchange, of Fourteen ($14) Dollars per share.

Thereupon, on motion duly made and seconded (Mr. Mitchell not voting), it was unanimously

Resolved, That the proper officers of this Corporation be and they hereby are authorized to enter into a contract with Electric Investors, Inc., to issue to that Corporation Eight Hundred and Eighty-eight (888) shares of Class A Common Stock of The American Superpower Corporation in exchange for the sale, transfer and delivery to this Corporation by Electric Investors, Inc., of Six Thousand, Nine Hundred Eighty-two (6,982) shares of Class A Common stock of Italian Superpower Corporation; and

Further resolved, That the proper officers of this Corporation be and they hereby are authorized to issue and deliver said Eight Hundred and Eighty-eight (888) shares of Class A Common Stock of this Corporation to Electric Investors, Inc., and that the Transfer Agent and Registrar be and they hereby are authorized and directed to countersign and register said shares; and

Further resolved, That, upon receipt by this Corporation of said Six Thousand Nine Hundred Eighty-two (6,982) shares of Class A Common Stock of Italian Superpower Corporation, the said Eight Hundred and Eighty-eight (888) shares of Class A Common Stock of The American Superpower Corporation be full paid and non-assessable.

The Chairman stated that it was the duty of the Directors to determine the valuation at which the consideration received for the issue of Class A Common Stock of this Corporation, authorized at this meeting, be taken on the books of this Corporation and what part of the same should be treated as capital.

Thereupon, on motion duly made and seconded, it was unanimously

[fol. 22] Resolved, That, of the consideration received for the issue of Twelve Thousand, Eight Hundred and Eighty-eight (12,888) shares of Class A Common Stock of The American Superpower Corporation, as above provided, each Reversionary Certificate of Italian Superpower Corporation be taken at a valuation of Ten ($10) Dollars per share, that each share of Class B Common Stock of Italian Superpower Corporation be taken at a valuation of Fifteen ($15) Dollars per share, and that each share of Class A

Common Stock of Italian Superpower Corporation be taken at a valuation of Fourteen ($14) Dollars per share; and

Further resolved, That, of the consideration received for the issue of each share of Class A Common Stock of this Corporation, One ($1) Dollar be deemed and determined to be capital and the balance of the consideration be added to the paid-in surplus of this Corporation.

There being no further business, on motion duly made and seconded, the meeting adjourned.

Ernest G. Strand, Secretary of the Meeting.

Schedule 3

Exhibit A.
S49306.

Void After 3 P. M., February 15, 1929

No. U00000.

Privilege to Purchase from The American Superpower Corporation — Shares Common Stock of The United Corporation.

Purchase Certificate for Common Stock (No Par Value) of The United Corporation, Incorporated Under the Laws of Delaware

This is to certify that —— —— or assigns, is entitled on or before 3 o'clock P. M. on February 15, 1929, but not thereafter, to purchase from The American Superpower Corporation — Shares of the no par value Common Stock of The United Corporation, a Delaware corporation, as the same may be constituted at the time of the exercise hereof, [fol. 23] at the rate of $25 per share, upon surrender hereof at the principal office of Central Union Trust Company of New York, Agent, 80 Broadway, The City of New York, and payment in New York funds at the time of such surrender for the number of the above shares which the holder hereof elects to purchase. Upon such surrender and payment there will be delivered to the holder hereof, stock certificates, in temporary or definitive form, when and as received and ready for delivery, for the number of shares of Common Stock purchased.

This Purchase Certificate is transferable, on or before 3 o'clock P. M. on February 15, 1929, by the holder hereof in person, or by his duly authorized attorney, on the books of Central Union Trust Company of New York, Agent, upon surrender hereof duly endorsed to Central Union Trust Company of New York, Agent, at its said principal office in The City of New York.

This Purchase Certificate is exchangeable, on or before 3 o'clock P. M. on February 15, 1929, at the said principal office of Central Union Trust Company of New York, Agent, for Purchase Certificates of other denominations entitling the holder thereof to purchase an equal aggregate number of shares of Common Stock as specified in this Certificate.

All rights under and by virtue of this Certificate are vested in the registered holder hereof and his lawful assigns, and until such assignment and due notification thereof, Central Union Trust Company of New York, Agent, and The American Superpower Corporation shall be entitled to treat such registered holder as the owner hereof for all purposes.

This Purchase Certificate entitles the holder to no rights except as above stated and unless it be surrendered and the payment made as aforesaid on or before 3 o'clock P. M. on February 15, 1929, it will become wholly void and the privilege of purchase represented hereby will terminate.

The American Superpower Corporation, by Central Union Trust Company of New York, Agent, by —— ——, Authorized Officer.

Dated, New York City, February 1, 1929.

[fol. 24] Specimen

Endorsed hereon are forms of

(1) Assignment to be executed in the presence of a witness by a registered holder hereof wishing to transfer this Certificate.

(2) Agreement to purchase to be executed by the holder hereof at the time of surrender hereof and payment.

Assignment

For value received — hereby sell, assign and transfer unto —— ——, the privilege to purchase Common Stock

evidenced by the within Purchase Certificate, and do hereby irrevocably constitute and appoint —— ——, attorney to transfer the said purchase privilege on the books of Central Union Trust Company of New York, Agent, with full power of substitution.

Dated February —, 1929.

(Signature:) —— ——. (Address:) ——.

In the presence of: —— ——.

Agreement to Purchase

The American Superpower Corporation:

The undersigned hereby agrees to purchase — shares of Common Stock of The United Corporation according to the terms of the within Certificate.

Dated February —, 1929.

(Signature:) —— ——. (Address:) ——.

Notice: The signature to the assignment must correspond with the name as written upon the face of the within Purchase Certificate, in every particular, without alteration or enlargement or any change whatever. Whenever assignments are executed by administrators, executors, trustees, guardians, attorneys, etc., proper evidence of their authority so to act must be forwarded with the assignments. The signature on assignments must be guaranteed by [fol. 25] bank or trust company having a New York correspondent or by a brokerage firm having membership in the New York Stock Exchange or Clearing House of the New York Curb Market.

Schedule 4

(Copy)

The American Superpower Corporation 19-21 Dover Green, Dover, Delaware

May 2, 1929.

To the Stockholders of The American Superpower Corporation:

GENTLEMEN:

At a meeting of the Board of Directors of The American Superpower Corporation held May 1, 1929, the Board voted to grant to the Common Stockholders of The American Superpower Corporation of record at the close of business

on May 8, 1929, the privilege to purchase from it shares of the Common Stock of The United Corporation at $30 per share at the rate of one share of The United Corporation stock for each four shares of The American Superpower Corporation Common Stock (both Class A and Class B) held on the said close of business on May 8, 1929.

These privileges to purchase will expire on the 24th day of May, 1929. Purchase Certificates for said purchase privileges will be mailed to stockholders of The American Superpower Corporation on or as soon after May 8th as practicable.

At the same meeting the Board of Directors also voted to call a special meeting of stockholders on June 4, 1929, to consider and vote upon, among other things, amendments to the Certificate of Incorporation providing for the Exchange of one share of the Class A and Class B common stock for five shares of a new class of stock to be designated as Common Stock, which class is to have full voting power. A formal notice of such meeting will shortly be mailed to you.

By Order of the Board of Directors.

E. G. Strand, Secretary.

[fol. 26] Schedule 5

(May 1, 1929)

"After discussion, on motion duly made out and seconded, it was unanimously

Resolved, That The American Superpower Corporation offer to the holders of Class A and Class B Common Stock, at the close of business on May 8th, 1929, the privilege of purchasing on or before the close of business on May 24th, 1929, full shares of Common Stock of The United Corporation owned by this Corporation at Thirty ($30) Dollars per share, to the extent of one (1) share of The United Corporation for every four (4) shares of Class A and Class B Common Stock of The American Superpower Corporation standing in the names of such holders on said date; and

Further resolved, That the forms of Purchase Certificates and Fractional Purchase Certificates be substantially the same as the forms of Purchase Certificates and Fractional Purchase Certificates used in the previous granting of a similar privilege to Stockholders of The American Superpower Corporation at the close of business on January 26th,

1929, copies of which are attached to the minutes of the meeting of the Board of directors of this Corporation held on January 23rd, 1929, with such changes as may be necessary by the different terms of the right or privilege now granted and as may be approved by the officers of this Corporation; and

Further resolved that the proper officers of this Corporation be, and they hereby are, authorized to make arrangements for the preparation of Purchase Certificates and Fractional Purchase Certificates in the proper quantities and to arrange with Central Union Trust Company of New York, as Agent for this Corporation, to mail to the holders of Class A and Class B Common Stock of this Corporation at the close of business on May 8th, 1929, Purchase Certificates and Fractional Purchase Certificates by Central Union Trust Company of New York, Agent; to accept the surrender of the Purchase Certificates and Fractional Purchase Certificates and the payments made as provided for therein; and to issue, upon such surrender and payment, the Com- [fol. 27] mon Stock of The United Corporation to which the holders of such Purchase Certificates and Fractional Purchase Certificates had become entitled; and

Further resolved, That the proper officers of this Corporation be, and they hereby are, authorized to deposit with the Transfer Agent of The United Corporation Certificates for Common Stock of The United Corporation owned by The American Superpower Corporation, representing the total number of shares called for by the Purchase Certificates and Fractional Purchase Certificates to be mailed to Stockholders of record at the close of business on May 8th, 1929; such Certificates to be endorsed in blank with the proper Federal and New York State Documentary stamps affixed and cancelled, and to instruct said Transfer Agent to transfer such stock on the books of The United Corporation and to issue Certificates in such names and in such denominations as may be requested by the written order of Central Union Trust Company of New York, Agent; and

Further resolved, That the proper officers of this Corporation be, and they hereby are, authorized to do any and all things in connection with the offer to Common Stockholders of The American Superpower Corporation and the privilege of purchasing Common Stock of The United Cor-

poration which, to such officers, may seem necessary or convenient to carry out the purpose of the above resolutions."

Schedule 6

BWP.

The American Superpower Corporation, Dover, Delaware

May 8th, 1929.

To the Holders of Class A and Class B Common Stock of The American Superpower Corporation:

GENTLEMEN:

There are enclosed herewith Purchase Certificate entitling the registered holder thereof to purchase from The American Superpower Corporation, on or before the 24th day of May, 1929, shares of the Common Stock of The United Corporation in the amounts stated in said Certificates, at Thirty ($30) Dollars per share. This right was granted to the holders of Class A and Class B Common Stock of The American Superpower Corporation at the [fol. 28] close of business on May 8th, 1929 in the ratio of one (1) share of Common Stock of The United Corporation for each four (4) shares of Class A and Class B Common Stock of The American Superpower Corporation held at the close of business on said date.

To exercise the purchase privilege, the Purchase Agreement endorsed on the back of the certificates must be duly executed and the certificates surrendered at the office of Central Union Trust Company of New York, 70 Broadway, New York, N. Y., accompanied by payment in New York funds for the shares purchased, at the rate of $30 per share, at or before 3.00 p. m. on May 24th, 1929. If the stock purchased is to be issued in a name other than that appearing on the face of the Purchase Certificates, New York State and Federal Transfer Stamps for each share must accompany the Purchase Certificates, or New York funds must be provided therefor at the rate of 4c per share. Certificates not surrendered at or before 3.00 P. M. on May 24th, 1929, will become void at that time; provided, however, that certificates held by persons living at such a distance from New York City that it is impossible for them to surrender such certificates at the office of Central Union Trust Company of New York at or before 3.00 P. M. on May 24th, will remain valid and the privilege may be exercised if Central

Union Trust Company of New York is duly notified prior to 3.00 p. m. on May 24th, by cable or telegram, that such certificates have been mailed and the purchase agreement duly executed and the envelope in which such certificates are enclosed is postmarked prior to said time. Purchase Certificates are transferable in the manner indicated on the back thereof upon surrender thereof together with New York State and Federal Transfer Stamps or funds therefor, at the aforesaid office of Central Union Trust Company of New York. Fractional Purchase Certificates are transferable by delivery.

The United Corporation

The United Corporation was organized in 1929 in the State of Delaware by J. P. Morgan & Co., Drexel & Co. and Bonbright & Company, Incorporated. Its summarized balance sheet, as of the close of business on the 4th day of May, 1929, is as follows:

[fol. 29]

Assets

Public Utilities:		
Common or Capital Stocks		$238,523,683.90
Preferred Stocks		6,673,590.00
Option Warrants		2,494,800.00
Miscellaneous Assets		11,457,878.65
		$259,149,952.55
Cash on hand		31,517.13
		$259,181,469.68

Liabilities

Preference	1,756,335 Shs.	$87,816,750.00
Common	5,665,910 "	28,329,550.00
Warrants	3,994,757*	
Paid in Surplus Less Organization Expenses		140,988,531.27
Demand Loans		696,000.00
Earned Surplus	$1,215,638.41	
Reserve for Taxes	135,000.00	1,350,638.41
		$259,181,469.68

* Warrants issued and outstanding entitling the holders thereof to purchase 3,994,757 shares of Common Stock at $27.50 per share at any time without limit.

The principal holdings of The United Corporation are in The United Gas Improvement Company, Public Service Corporation of New Jersey, Mohawk & Hudson Power Company, Allied Power & Light Corporation and other public utility operating and holding companies. The market value of its holdings at closing bid prices, May 3, 1929, was in excess of $300,000,000.

Based on market values, The American Superpower Corporation's largest investment in any one company is in The United Corporation, and this will remain the case even after the sale by The American Superpower Corporation of the shares of Common Stock of The United Corporation to purchase which these rights to purchase are being given to the Class A and Class B Common Stockholders.

Yours very truly, E. G. Strand, Secretary.

[fol. 30] Schedule 7

S52922.

Void After 3 P. M. May 24, 1929

No. U00000.

Privilege to Purchase from The American Superpower Corporation — Shares Common Stock of The United Corporation.

Purchase Certificate for Common Stock (No Par Value) of The United Corporation, Incorporated Under the Laws of Delaware

This is to certify that —— —— or assigns, is entitled on or before 3 o'clock P. M. on May 24, 1929, but not thereafter, to purchase from The American Superpower Corporation — Shares of the no par value Common Stock of The United Corporation, a Delaware corporation, as the same may be constituted at the time of the exercise hereof, at the rate of $30. per share upon surrender hereof at the principal office of Central Union Trust Company of New York, Agent, 70 Broadway, The City of New York, and payment in New York funds at the time of such surrender for the number of the above shares which the holder hereof elects to purchase. Upon such surrender and payment there will be delivered to the holder hereof, stock certificates, in temporary or definitive form, when and as received and ready for delivery, for the number of shares of Common Stock purchased.

This Purchase Certificate is transferable, on or before 3 o'clock p. m. on May 24, 1929, by the registered holder hereof in person, or by his duly authorized attorney, on the books of Central Union Trust Company of New York, Agent, upon surrender hereof duly endorsed to Central Union Trust Company of New York, Agent, at its said principal office in The City of New York.

This Purchase Certificate is exchangeable, on or before 3 o'clock p. m. on May 24, 1929, at the said principal office of Central Union Trust Company of New York, Agent, for Purchase Certificates of other denominations entitling the holder thereof to purchase an equal aggregate number of shares of Common Stock as specified in this Certificate.

[fol. 31] All rights under and by virtue of this Certificate are vested in the registered holder hereof and his lawful assigns, and until such assignment and due notification thereof, Central Union Trust Company of New York, Agent, and The American Superpower Corporation shall be entitled to treat such registered holder as the owner hereof for all purpbses.

This Purchase Certificate entitles the holder to no rights except as above stated and unless it be surrendered and the payment made as aforesaid on or before 3 o'clock p. m. on May 24, 1929, it will become wholly void and the privilege of purchase represented hereby will terminate.

Dated, New York City, May 8, 1929.

The American Superpower Corporation, by Central Union Trust Company of New York, Agent, by —— ——, Authorized Officer.

Specimen

Endorsed hereon are forms of

(1) Assignment to be executed in the presence of a witness by a registered holder hereof wishing to transfer this Certificate.

(2) Agreement to purchase to be executed by the holder hereof at the time of surrender hereof and payment.

Assignment

For value received — hereby sell, assign and transfer unto the privilege to purchase Common Stock evidenced by the within Purchase Certificate, and do hereby irrevocably constitute and appoint —— ——, attorney to transfer the said

purchase privilege on the books of Central Union Trust Company of New York, Agent, with full power of substitution.

Dated, May —, 1929.

(Signature:) —— ——. (Address:) ——.

In the presence of: —— ——.

[fol. 32] Agreement to Purchase

The American Superpower Corporation:

The undersigned hereby agrees to purchase — shares of Common Stock of The United Corporation according to the terms of the within Certificate.

Dated, May —, 1929.

(Signature:) —— ——. (Address:) ——.

Notice: The signature to the assignment must correspond with the name as written upon the face of the within Purchase Certificate, in every particular, without alteration or enlargement or any change whatever. Whenever assignments are executed by administrators, executors, trustees, guardians, attorneys, etc., proper evidence of their authority so to act must be forwarded with the assignments. The signature on assignments must be guaranteed by a bank or trust company having a New York correspondent or by a brokerage firm having membership in the New York Stock Exchange or Clearing House of the New York Curb Market.

Schedule 8.

The American Superpower Corporation, 19—21 Dover Green, Dover, Delaware

Re Rights to Purchase Common Stock of The Commonwealth & Southern Corporation

June 5, 1929.

To the Holders of the Common Stock of The American Superpower Corporation:

We take pleasure in announcing that The American Superpower Corporation has participated in the organization of The Commonwealth & Southern Corporation. The American Superpower Corporation subscribed to stock of the new company for cash and, together with certain other large holders, agreed to exchange its holdings in Commonwealth

Power Corporation, Southeastern Power & Light Company [fol. 33] and Penn-Ohio Edison Company for Common Stock and Option Warrants of The Commonwealth & Southern Corporation.

At a meeting of the Board of Directors of The American Superpower Corporation, held today, the Board voted to grant to the Common Stockholders of The American Superpower Corporation of record at the close of business on June 18th, 1929 the right to purchase from it shares of the Common Stock of The Commonwealth & Southern Corporation at $15.00 per share, at the rate of one share of The Commonwealth & Southern Corporation Common Stock for each ten shares of the new Common Stock of The American Superpower Corporation held at the close of business on June 18th, 1929.

These rights to purchase will expire on July 2nd, 1929. Purchase Certificates for the above purchase privilege will be mailed to the stockholders of The American Superpower Corporation on or about June 22nd, 1929, together with further information in regard to The Commonwealth & Southern Corporation. The American Superpower Corporation will retain the major portion of its interest in The Commonwealth & Southern Corporation, which will constitute one of its largest investments.

Very truly yours, E. G. Strand, Secretary.

Schedule 9

(June 5, 1929)

After discussion, on motion duly made and seconded, it was unanimously

Resolved, That, subject to the Plan and Deposit Agreement dated as of May 24th, 1929, under which Common Stock of Commonwealth Power Corporation and Common Stock and Option Warrants of Southeastern Power & Light Company and of Penn-Ohio Edison Company are to be offered to the Commonwealth & Southern Corporation in exchange for Common Stock and Option Warrants of that Corporation, being declared operative, The American Superpower Corporation offers to the holders of its Common Stock of record at the close of business on June 18th, 1929, the right [fol. 34] to purchase at or before 3 p. m. on July 2nd, 1929, full shares of Common Stock of The Commonwealth & Southern Corporation owned by this Corporation at Fif-

teen ($15) Dollars per share and at the rate of one (1) share of Common Stock of the Commonwealth & Southern Corporation for every ten (10) shares of Common Stock standing in the names of such Stockholders on the above record date (and in the event that on said date there are still outstanding in the hands of record holders any of the old Class A and Class B Common Stock of this Corporation, then the rate shall be one (1) share, of Common Stock of The Commonwealth & Southern Corporation for every two (2) shares of such Class A or Class B Common Stock); provided, however, that there shall be no right to purchase fractional shares of stock; but the Corporation shall issue Fractional Purchase Certificates representing the right to purchase one (1) or more full shares of Common Stock of The Commonwealth & Southern Corporation, upon surrender of such Fractional Purchase Certificate with other Fractional Purchase Certificates representing in the aggregate rights in respect to the purchase of one (1) or more full shares of Common Stock of The Commonwealth & Southern Corporation; and

Further resolved, That the forms of Purchase Certificate and Fractional Purchase Certificate be substantially the same as the form of Purchase Certificate and Fractional Purchase Certificate used in the previous granting of a similar privilege to the Stockholders of The American Superpower Corporation at the close of business on January 26th, 1929, to purchase Common Stock of The United Corporation, copies of which are attached to the minutes of the meeting of the Board of Directors of this Corporation held on January 23, 1929, with such changes as may be necessitated by the different terms of the right or privilege now granted as may be approved by the officers of this Corporation; and

Further resolved, That the proper officers of this Corporation be, and they hereby are, authorized to make arrangements for the preparation of Purchase Certificates and Fractional Purchase Certificates in the proper quantities and to arrange with Central Hanover Bank and Trust Company, as Agent for this Corporation, to mail to the holders of [fol. 35] Common Stock of this Corporation at the close of business on June 18th, 1929, Purchase Certificates and Fractional Purchase Certificates, signed by Central Hanover Bank and Trust Company, Agent; to accept the surrender of the Purchase Certificates and Fractional Purchase Certifi-

cates and the payments made as provided for therein; and to distribute upon such surrender and payment the Common Stock of The Commonwealth & Southern Corporation, to which the holders of such Purchase Certificates and Fractional Purchase Certificates shall have become entitled; and

Further resolved, That the proper officers of this Corporation be and they hereby are authorized to deposit with the Transfer Agent of The Commonwealth & Southern Corporation certificates for Common Stock of The Commonwealth & Southern Corporation owned by The American Superpower Corporation representing the total number of shares called for by the Purchase Certificates and Fractional Purchase Certificates to be mailed to Stockholders of record at the close of business on June 18th, 1929; such certificates to be endorsed in blank with the proper Federal and New York State documentary stamps affixed and cancelled, and to instruct said Transfer Agent to transfer such stock on the books of The Commonwealth & Southern Corporation and to issue certificates in such names and in such denominations as may be requested by the written order of Central Hanover Bank and Trust Company, Agent; and

Further resolved, That the proper officers of this Corporation be and they hereby are authorized to do any and all things in connection with the offer to Common Stockholders of The American Superpower Corporation and the privilege of purchasing Common Stock of The Commonwealth & Southern Corporation, which, to such officers, may seem necessary or convenient to carry out the purpose of the above resolutions; and

Further resolved, That the first Five Hundred Thousand (500,000) shares of Common Stock of The Commonwealth & Southern Corporation, to be sold under the above offer of rights to purchase, shall be the Five Hundred Thousand (500,000) shares acquired by The American Superpower Corporation as a result of its cash subscription."

[fol. 36] Schedule 10

B. W. P.

The American Superpower Corporation, Dover, Delaware

June 22, 1929.

To the Holders of the Common Stock of The American Superpower Corporation:

GENTLEMEN:

There are enclosed herewith Purchase Certificates entitling the registered holder thereof to purchase from The American Superpower Corporation, at or before 3 p. m. on July 2, 1929, shares of the Common Stock of The Commonwealth & Southern Corporation in the amount stated in said certificates, at Fifteen Dollars ($15.) per share. This right was granted to the holders of record at the close of business on June 18, 1929, of the new Common Stock of The American Superpower Corporation (which was authorized at a stockholders' meeting on June 4, 1929, to be issued at the rate of five (5) shares for each share of the old Class A or Class B Common Stock), in the ratio of one (1) share of Common Stock of The Commonwealth & Southern Corporation for each ten (10) shares of the new Common Stock of The American Superpower Corporation held at the close of business on June 18, 1929. The same right was granted to the holders of Class A and Class B Common Stock of record at the close of business on June 18, 1929, who had not by said date exchanged their shares for shares of the new Common Stock, in the ratio of one (1) share of Common Stock of The Commonwealth & Southern Corporation for each two (2) shares of Class A or Class B Common Stock of The American Superpower Corporation held at the close of business on said date.

To exercise the purchase privilege, the Purchase Agreement endorsed on the back of the certificates must be duly executed and the certificates surrendered at the office of Central Hanover Bank and Trust Company, 70 Broadway, New York, N. Y., accompanied by payment in New York funds for the shares purchased, at the rate of $15 per share, at or before 3 p. m. on July 2, 1929. If the stock purchased is to be issued in a name other than that appearing on the face of the Purchase Certificates, New York State and Federal Trans-

[fol. 37] fer Stamps for each share must accompany the Purchase Certificates, or New York funds must be provided therefor at the rate of 4c per share. Certificates not surrendered at or before 3 p. m. on July 2, 1929, will become void at that time; provided, however, that certificates held by persons living at such a distance from New York City that it is impossible for them to surrender such certificates at the office of the Central Hanover Bank and Trust Company at or before 3 p. m. on July 2nd, will remain valid and the privilege may be exercised if Central Hanover Bank and Trust Company is duly notified prior to 3 p. m. on July 2nd, by cable or telegram, that such certificates have been mailed and the purchase agreement duly executed and if the envelope in which such certificates are enclosed is postmarked prior to said time. Purchase Certificates are transferable in the manner indicated on the back thereof upon surrender thereof together with New York State and Federal Transfer Stamps or funds therefor, at the aforesaid office of Central Hanover Bank and Trust Company, Fractional Purchase Certificates are transferable by delivery.

The Commonwealth & Southern Corporation

The Commonwealth & Southern Corporation was organized on May 23, 1929, in the State of Delaware. Its principal holdings are in Commonwealth Power Corporation, Southeastern Power & Light Company, and Penn-Ohio Edison Company, in each of which three companies it had acquired by June 12, 1929, more than a majority of the Common Stock. On June 12, 1929, an offer was made by The Commonwealth & Southern Corporation to the holders of Common Stock of Commonwealth Power Corporation, of Common Stock and Option Warrants of Penn-Ohio Edison Company and of Common Stock, Voting Trust Certificates and Option Warrants of Southeastern Power & Light Company to exchange their stock, warrants and voting trust certificates for Common Stock and Option Warrants of The Commonwealth & Southern Corporation. Should all of the stock, voting trust certificates and option warrants of said three companies outstanding June 8, 1929, be exchanged for the Common Stock and Option Warrants of [fol. 38] The Commonwealth & Southern Corporation, the balance sheet of The Commonwealth & Southern Corporation, as shown in its said offer of June 12, 1929, based on

approximate market values of that date, would be substantially as follows:

	Assets	
Securities Owned		$692,312,062.50
1,645,054⅛	Shares Com'l Pr. Corp. Com. Stock	
2,294,982	Shares Southeastern P. & L. Co. Common Stock	
344,651	Southeastern P. & L. Co. Options	
937,593	Shares Penn-Ohio Edison Co. Common Stock	
72,162	Penn-Ohio Edison Co. A Options	
95,184⅔	Penn-Ohio Edison Co. B Options	
Cash and Receivables		45,000,000.00
Total		$737,312,062.50
	Liabilities	
Capital and paid in surplus represented by 29,942,482½ no par shares of Common Stock and Option Warrants entitling the holders thereof to purchase 16,096,241¼ shares Common Stock at $30 per share at any time without limit after September 1, 1929.*		$737,312,062,50
Total		$737,312,062.50

Based on market values, the investment in The Commonwealth & Southern Corporation is one of The American Superpower Corporation's largest investments in any one company, and this will remain the case even after the sale by The American Superpower Corporation of the shares of Common Stock of The Commonwealth & Southern Corporation to purchase which these rights to purchase are being given to the Common Stockholders.

Yours very truly, E. G. Strand, Secretary.

[fol. 39] Schedule 11

S54937. Void After 3 p. m. July 2, 1929

No. PC 00000.

Privilege to Purchase from The American Superpower Corporation—Shares Common Stock of The Commonwealth & Southern Corporation.

Purchase Certificate For Common Stock (No Par Value) of The Commonwealth & Southern Corporation Incorporated Under the Laws of Delaware

This is to certify that —— —— or assigns, is entitled at or before 3 o'clock p. m. on July 2, 1929, but not, thereafter, to purchase from The American Superpower Corporation not more than — shares of the no par value Common Stock of The Commonwealth & Southern Corporation, a Delaware corporation, as the same may be constituted at the time of the exercise hereof, at the rate of $15 per share, upon surrender hereof at the principal office of Central Hanover Bank and Trust Company, Agent, 70 Broadway. The City of New York, and payment in New York funds at the time of such surrender for the number of the above shares which the holder hereof elects to purchase. Upon such surrender and payment there will be delivered to the holder hereof, stock certificates in temporary or definitive form, when and as received and ready for delivery, for the number of shares of Common Stock purchased.

This Purchase Certificate is transferable, at or before 3 o'clock p. m. on July 2, 1929, by the registered holder hereof in person, or by his duly authorized attorney, on the books of Central Hanover Bank and Trust Company, Agent, upon surrender hereof, duly endorsed, to Central Hanover Bank and Trust Company, Agent, at its said principal office in The City of New York.

This Purchase Certificate is exchangeable, at or before 3 o'clock p. m. on July 2, 1929, at the said principal office of Central Hanover Bank and Trust Company, Agent, for Purchase Certificates of other denominations entitling the holder thereof to purchase an aggregate number of shares [fol. 40] of Common Stock equal to that specified in this Certificate.

All rights under and by virtue of this Certificate are vested in the registered holder hereof and his lawful assigns, and until such assignment and due notification

thereof, Central Hanover Bank and Trust Company, Agent, and The American Superpower Corporation shall be entitled to treat such registered holder as the owner hereof for all purposes.

This Purchase Certificate entitles the holder to no rights except as above stated and unless it be surrendered and the payment made as aforesaid at or before 3 o'clock p. m. on July 2, 1929, it will become wholly void and the privilege of purchase represented hereby will terminate.

Dated, New York City, June 22, 1929.

The American Superpower Corporation, by Central Hanover Bank and Trust Company, Agent,——, ——, Authorized Officer.

Endorsed hereon are forms of

(1) Assignment to be executed in the presence of a witness by a registered holder hereof wishing to transfer this Certificate.

(2) Agreement to purchase to be executed by the holder hereof at the time of surrender hereof and payment.

Specimen

Assignment

For value received — hereby sell, assign and transfer unto —— —— the privilege to purchase Common Stock evidenced by the within Purchase Certificate, and do hereby irrevocably constitute and appoint —— ——, attorney to transfer the said purchase privilege on the books of Central Hanover Bank and Trust Company, Agent, with full power of substitution.

Dated —— —, 1929.

(Signature:) —— ——. (Address:) ——.

In the presence of: —— ——.

[fol. 41] Agreement to Purchase

The American Superpower Corporation:

The undersigned hereby agrees to purchase — shares of Common Stock of The Commonwealth & Southern Corporation according to the terms of the within Certificate.

Dated —— —, 1929.

(Signature: —— ——. (Address:) ——.

Notice: The signature to the assignment must correspond with the name as written upon the face of the within

Purchase Certificate, in every particular, without alteration or enlargement or any change whatever. Whenever assignments are executed by administrators, executors, trustees, guardian attorneys, etc., proper evidence of their authority so to act must be forwarded with the assignments. The signature on assignments must be guaranteed by a bank or trust company having a New York correspondent or by a brokerage firm having membership in the New York Stock Exchange or Clearing House of the New York Curb Market.

Schedule 12

I, Ernest G. Strand, Secretary of The American Superpower Corporation, do hereby certify that the following is a full, true and complete copy of the minutes of a meeting of the Board of Directors of said Corporation held on the 9th day of January, 1929:

Minutes of the regular meeting of the Board of Directors of The American Superpower Corporation held at the Office of Bonbright & Company, Incorporated, No. 25 Nassau Street, Borough of Manhattan, City of New York, on the 9th day of January, 1929, being adjourned from the 2nd day of January, 1929.

Absent: Mr. T. B. Macaulay,

Present Messrs. Landon K. Thorne, Alfred L. Loomis, Horace S. Scarritt, George Roberts, George E. Hardy, B. C. Cobb, Sidney Z. Mitchell, R. P. Stevens, William Spencer [fol. 42] Murray, Thomas N. McCarter, Percy S. Young, William W. Bodine, Francis B. Thorne, Richard Schaddellee,

being all of the Directors of the Corporation.

Mr. Loomis presided at the meeting and Mr. Roberts acted as Secretary thereof.

The minutes of the last meeting of the Board of Directors, held on the 5th day of December, 1928 were read, and, on motion duly made and seconded, it was unanimously

Resolved, That the minutes of the meeting of the Board of Directors held on the 5th day of December, 1928, be approved.

The following informal and condensed balance sheet of the Corporation was submitted to the meeting, together with the following schedule, showing securities owned:

Assets	
Securities Owned—Schedule No. 1	$67,950,192.93
Current assets—	
New England Trust Co., including $880,448 to cover 1st Pfd. and Preference dividends payable January 2, 1929	$890,448.00
Bonbright & Company, Inc.	3,082,662.70
Dividends Receivable	325,193.77
Due from Subscribers to Class "A" Common Stock	8,254,971.60
Total	$12,553,316.07
Due from subsidiaries	3,693.71
Total assets	$80,507,202.71
Liabilities	
First preferred stock 400,000 Shares, No Par Value	$40,000,000.00
Preference Stock 266,994 Shares, No Par Value. 170 Shares of Script, No Par Value.	267,164.00
267,164	
[fol. 43] Common Stock 801,827.86 Shares, of Class "A", No Par Value. 814,188.00 Shares, of Class "B", No Par Value.	1,616,015.86
1,616,015.86 Total.	
Paid-in Surplus	29,463,443.48
Earned Surplus—Exhibit "B"	7,229,520.87
Total Capital and Surplus	$78,576,144.21
Current and Deferred Liabilities—	
Dividends Accrued on—	
First Preferred Stock	$480,000.00
Preference Stock	400,488.00

Reserve for Income Taxes	385,565.68
Subscription to Societe Lyonnaise Stock	650,064.82
Subscription to United Illuminating Stock	14,775.00
Miscellaneous	165.00
Total	$1,931,058.50
Total Liabilities	$80,507,202.71

New York, January 7, 1929

Exhibit "A"

The American Superpower Corporation Securities Owned December 31st, 1928

		Number of Shares or Par of Bonds	Average	Cost Amount
	List A—Preferred Stock:			
$7.	American & Foreign Power 2nd Pfd	6,000	82.71	$496,493.01
	List B—Common Stocks Paying Dividends:			
$2.40	Public Service Corp. of N. J.	800,000	24.88	$19,904,321.38
3.	Commonwealth Power Corp.	357,975	47.25	16,914,512.28
1.	Southeastern Power & Light	150,300	51.062	7,674,622.25
1.	Penn-Ohio Edison	169,302 43/50	28.095	4,756,590.83
4.	United Gas Improvement	50,000	104.37	5,218,585.00
.60	Utility Shares	368,227	13.71	5,049,519.51
1.	National Power & Light	75,000	27.59	2,069,535.25
[fol. 44]				
1.	Electric Bond & Share Securities	15,000	97.931	1,468,976.20
3.	United Illuminating	9,847	49.3453	485,903.97
	United Illuminating Subscrip. Stock	985	41.39	40,769.36
.48	United Light & Power "B"	24,165	4.04	97,660.07
1.	American Gas & Electric	6,201 30/50	39.091	242,406.36
2.	Waterbury Gas Light	11,000	67.0909	738,000.00
1.	American Water Works & Electric	10,000	68.17	681,700.00
6.	Consolidated Gas, Electric Light & Power (Baltimore)	5,000	52.941	264,707.23
1.20	Cities Service Company, Common	3,727	43,466	162,000.00
1.	American Power & Light	3,427	54.6075	187,150.88
8.	Detroit Edison	1,167	117.1572	136,722.50
5.	Columbia Gas & Electric	1,000	79.2688	79,268.80
	Total—List B			$66,172,951.87
	List C—Not Paying Dividends			
	American & Foreign Power:			
	Warrants	24,000	8.2485	$197,964.17
	Societe Lyonnaise	10,000	97.50	975,097.23
	Electric Power & Light Warrants	27,200	1.75	47,697.70
	Electric Railway Sec. Capital	12,000	3.4154	40,984.95
	Penn-Ohio Edison Warrants (New)	3,400	5.589	19,004.00
	Total—List C			$1,260,748.05
	Total—Lists A, B, and C			$67,950,192.93

New York, January 7, 1929.

On motion duly made and seconded, it was unanimously

Resolved That said balance sheet and the schedule of securities owned be approved; and

Further Resolved, That the changes made in investments by the officers of the Corporation since the last meeting of the Board of Directors be ratified, approved and confirmed.

The Chairman reported that, as a result of the exchange offer to the holders of stock of the Utility Shares Corpo-
[fol. 45] ration, as authorized at the last meeting of the Board, additional shares of said Company had been acquired so that, as of the close of business on January 8th, 1929, the Corporation owned Three Hundred Seventy-one Thousand, Four Hundred Ninety-seven (371,497) shares of stock of Utility Shares Corporation, or slightly over Ninety-three (93%) Percent. of the outstanding stock of that Company.

The Chairman reported that all but Four Thousand, Seven Hundred (4,700) shares of the Corporation's Class A Common Stock, which was offered for subscription to the stockholders, had been taken by them. Under the underwriting contract, the underwriters will take up these Four Thousand, Seven Hundred (4,700) shares at the subscription price.

The Chairman then submitted to the meeting a communication from The United Corporation, which communication was as follows:

January 9th, 1929.

"The American Superpower Corporation, Dover, Delaware.

"GENTLEMEN:

The undersigned corporation has been organized under the Laws of the State of Delaware, with an authorized Capital Stock of Thirteen Million (13,000,000) shares, all without nominal or par value, of which One Million (1,000,000) shares are to be First Preferred Stock, Two Million (2,000,000) shares are to be Preference Stock and Ten Million (10,000,000) shares are to be Common Stock. We enclose herewith a certified copy of our Certificate of Incorporation.

"We have created a $3 Series of Preference Stock, to be designated at $3 Cumulative Preference Stock, which Series

is to have a dividend rate of $3 per share per annum, is to be redeemable at the price of Fifty-five ($55) Dollars per share plus an amount equal to accrued dividends. Dividends are to be payable, if declared, on the first days of January, April, July and October. We enclose herewith a specimen certificate of the $3 Cumulative Preference Stock.

"We have also created, in accordance with the terms of our Charter, a form of Option Warrant entitling the holder thereof to purchase at any time, without limit, shares of [fol. 46] Common Stock of our Corporation, as such stock may be constituted at the time of such purchase, at a price of Twenty-seven and 50/100 ($27.50) Dollars per share, subject to the further terms and conditions therein stated. We enclose herewith a specimen form of Option Warrant.

"We have issued or contracted to issue and sell, partially to J. P. Morgan & Co. and partially to Bonbright Electric Corporation, or their nominees, an aggregate amount of:

(a) Six Hundred Thousand (600,000) shares of our $3 Cumulative Preference Stock;

(b) One Million, Six Hundred Thousand (1,600,000) shares of our Common Stock; and

(c) Option Warrants, in the form above described, entitling the holders to purchase at any time, without limit, an aggregate amount of Two Million, Seven Hundred Fourteen Thousand, Two Hundred (2,714,200) shares of Common Stock at Twenty-seven and 50/100 ($27.50) Dollars per share.

"In consideration for the issuance of such securities we have or are to receive the following:

1. Cash in sum of $20,371,025.76.

2. 130,565 shares of the Capital Stock of The United Gas Improvement Company.

3. 59,500 shares of the Common Stock of Public Service Corporation of New Jersey.

4. 62,360 shares of the Second Preferred Stock of Mohawk Hudson Power Corporation.

5. 358,957 shares of the Common Stock of Mohawk Hudson Power Corporation.

6. 124,740 Option Warrants of Mohawk Hudson Power Corporation, each of such Option Warrants authorizing the holder thereof to purchase at any time one share of Common Stock of that Company at $50 per share.

"We understand that you have under consideration the creation of a subsidiary corporation under the Laws of the State of Delaware, to be known as The Public Electric Holding Corporation, or by some other appropriate name, [fol. 47] which corporation is hereafter referred to as the "Subsidiary Corporation", to have an authorized capital stock of Ten Thousand (10,000) shares with a par value of One Hundred ($100) Dollars each, for the purpose of transferring and delivering to that corporation Eight Hundred Thousand (800,000) shares of the Common Stock of Public Service Corporation of New Jersey and Fifty-three Thousand (53,000) shares of the Common Stock of The United Gas Improvement Company, together with cash in the amount of Twenty-five ($25) Dollars in consideration of the issuance and delivery to you of the entire stock of that corporation.

"Subject to the necessary approval of our stockholders, we hereby offer to merge and consolidate said Subsidiary Corporation to be created by you into our corporation,—the consolidated corporation to be known as The United Corporation. The terms of the proposed merger and consolidation are contained in a draft of Agreement of Merger and Consolidation, which we submit to you herewith. By the terms of this Agreement of Merger and Consolidation, you would receive Thirty-four and 4187/10000 (34.4187) shares of $3 Cumulative Preference Stock, Two Hundred Twenty-one and 853/10000 (221.0853) shares of Common Stock and Option Warrants entitling the holder to purchase One Hundred (100) shares of Common Stock of the Consolidated Corporation for each share of the Capital Stock of the said Subsidiary Corporation held by you. You will thus be entitled to receive in exchange for all of the Capital Stock of the said Subsidiary Corporation held by you in the aggregate Three Hundred Forty-four Thousand, One Hundred Eighty-seven (344,187) shares of $3 Cumulative Preference Stock, Two Million, Two Hundred Ten Thousand, Eight Hundred Fifty-three (2,210,853) shares of Common Stock and Option Warrants

entitling the holder thereof to purchase One Million (1,000,000) shares of Common Stock at Twenty-seven and 50/100 ($27.50) Dollars.

"It is understood that, of the consideration to be received for the issue of the above shares of $3 Cumulative Preference Stock, Common Stock and Option Warrants, Fifty [fol. 48] ($50) Dollars shall constitute the consideration for the issue of each share of $3 Cumulative Preference Stock, One ($1) Dollar shall constitute the consideration for the issue of each right represented by the above Option Warrants to purchase one (1) share of the Common Stock of the Consolidated Corporation at Twenty-seven and 50/100 ($27.50) Dollars per share, and the balance of the consideration shall constitute the consideration received for the issue of theabove mentioned Common Stock, and that, of the consideration received for the issue of the $3 Cumulative Preference Stock, the entire consideration, i. e., Fifty ($50) Dollars, will be determined to be capital and that, of the consideration received for the issues of Common Stock, Five ($5) Dollars per share will be determined to be capital and the balance of the consideration received for the Common Stock and the entire consideration received for the Option Warrants will be credited to paid-in surplus of the Consolidated Corporation.

"By the terms of said Agreement, the holders of the stock and Option Warrants of our Corporation will be entitled to such stock and Option Warrants in the merged corporation in the same amounts as their present holdings.

"It is understood that the assets and liabilities of the two consolidated corporations will continue until the merger is completed, as above set forth, subject only to organization expenses and such changes as may occur by the investment of the cash of our corporation.

"If this offer is acceptable to you you will agree to proceed at once to incorporate said Subsidiary Corporation and to take the necessary corporate steps to complete the merger, and we agree forthwith to call the necessary Directors and Stockholders meetings in regard thereto.

"It is understood that the draft of Agreement of Merger and Consolidation submitted herewith is subject to such changes as may be mutually agreed upon between us.

"Upon your acceptance hereof, as provided below, this [fol. 49] letter will constitute a contract between us, subject to the approval of our Stockholders as above stated.

Very truly yours, The United Corporation, by (S.) Sherman Ewing, Vice-President.

Accepted, January 9th, 1929.

The American Superpower Corporation, by (S.) H. S. Scarritt, Vice-President."

The enclosures in said letter, to-wit: Certificate of Incorporation of The United Corporation, Specimen Certificate of $3 Cumulative Preference Stock of The United Corporation, Specimen Certificate of Option Warrant of The United Corporation, and draft of proposed Consolidation Agreement between The United Corporation and The Public Electric Holding Corporation were also submitted to the meeting.

Mr. Loomis stated, that owing to the interest of himself, Mr. Thorne, Mr. Scarritt and Mr. Roberts in Bonbright Electric Corporation and the interest of Bonbright Electric Corporation in The United Corporation, and the fact that Mr. Roberts was now a Director of The United Corporation and that he and Mr. Thorne might later be Directors of The United Corporation, neither he, nor Mr. Thorne, Mr. Scarritt nor Mr. Roberts would vote on any resolutions which might be made in regard to the above offer of The United Corporation, nor would they make any recommendations as to what action should be taken by this Board; they would, however, be glad to answer any questions which any Director might desire to ask them in regard to The United Corporation and the offer made to The American Superpower Corporation.

There ensued a discussion for over one hour of the offer made by The United Corporation. The details of the Plan were examined at length. Mr. McCarter stated that he believed the acceptance of the offer of The United Corporation was to the best interest of The American Superpower Corporation for reasons which he outlined. He further stated that he did not regard the acquisition by The United Corporation of the contemplated number of shares [fol. 50] of the Public Service Corporation of New Jersey as any violation of the principal that utilities of any one state, such as New Jersey, should be controlled by a New

Jersey Company, which would preserve its independent identity. Several of the Directors, including Mr. Mitchell, Mr. Thorne and Mr. Loomis, expressed themselves as in favor of decentralization rather than centralization of operating companies, thus tending to obviate the possibility of absentee management and direction.

All the Directors who spoke expressed themselves in favor of the principle of preserving the identity of the local operating units, on the Boards of which companies there should be strong local representation. Messrs. Mitchell, Cobb, Murray, Hardy, Bodine, Schaddelee and Young also spoke in favor of accepting the offer.

Mr. Loomis stated that, if the offer were accepted and the stock of The United Corporation acquired, as therein contemplated, the officers expected at some later date to submit to the Board a proposition, by which The American Superpower Corporation would dispose of a substantial part of the stock of The United Corporation so acquired to the holders of the Common Stock of the American Superpower Corporation by offering to said stockholders a right to purchase part of the Corporation's holding of The United Corporation stock. By this means, there would be a wide distribution of the stock of The United Corporation.

Thereupon, on motion duly made and seconded (Messrs. Thorne, Loomis, Scarritt and Roberts not voting), it was unanimously

Resolved, That, as part of a Plan of Reorganization, The American Superpower Corporation organize a subsidiary corporation under the Laws of the State of Delaware, to be known as The Public Electric Holding Corporation, which Company shall have an authorized capital stock of Ten Thousand (10,000) shares with a par value of One Hundred ($100) Dollars each; that this Corporation transfer and deliver to said The Public Electric Holding Corporation Eight Hundred Thousand (800,000) shares of the Common Stock of Public Service Corporation of New Jersey and Fifty-three Thousand (53,000) shares of the [fol. 51] Common Stock of The United Gas Improvement Company, together with cash in the amount of Twenty-five ($25) Dollars, in consideration of the issuance and delivery to The American Superpower Corporation of the entire capital stock of the said The Public Electric Holding Corporation, i. e., Ten Thousand (10,000) shares and

Further resolved, That The American Superpower Corporation accept the offer of The United Corporation, dated January 9th, 1929, to merge The United Corporation with The Public Electric Holding Corporation on the terms and conditions stated in said offer, as presented to this meeting; and

Further resolved, That the proper officers of this Corporation be and they hereby are authorized to take such action as may be advisable to incorporate said subsidiary corporation, The Public Electric Holding Corporation; to transfer the stock of the Public Service Corporation of New Jersey and The United Gas Improvement Company held by this Corporation to The Public Electric Holding Corporation in return for the immediate issue of all of its capital stock to this Corporation; to accept the offer of The United Corporation, dated January 9th, 1929, submitted to this meeting and to execute and deliver a written acceptance of said offer; to vote the said stock of The Public Electric Holding Corporation in favor of the merger with The United Corporation, as above provided; and in general to execute instruments and to do all things necessary or advisable to carry into effect the above resolutions.

The Chairman stated that he had been advised by counsel that, as a considerable number of amendments had been made from time to time to the By-Laws of the Corporation, and that, as counsel had suggested certain additional amendments to the By-Laws, chiefly with respect to procedure, it would be convenient for the Board to adopt a complete new set of By-Laws. At the request of the Chairman, counsel explained briefly the nature of the proposed changes and submitted copies of the proposed revised By-Laws to the Board.

Thereupon, on motion duly made and seconded, it was unanimously

[fol. 52] Resolved, That the By-Laws of this Corporation previously adopted be amended, so that the By-Laws read in accordance with the printed set of By-Laws submitted to this meeting, which are hereby adopted as the By-Laws of this Corporation; and

Further resolved, That a copy of the By-Laws, as so adopted, be affixed to the minutes of this meeting.

The Chairman reported that a certificate representing Ten (10) shares of First Preferred Stock of this Corpora-

tion, numbered 2420, standing in the name of Ellen J. Ferree, had been lost and that a request had been made for the issuance of a duplicate certificate, and that a surety bond in an amount satisfactory to the officers of the Corporation had been given this Corporation, indemnifying it against loss.

Thereupon, on motion duly made and seconded, it was unanimously

Resolved, That the officers of this Corporation be and they hereby are authorized to execute and deliver a duplicate certificate, representing Ten (10) shares of First Preferred Stock of this Corporation, in lieu and in place of Certificate No. 2420, standing in the name of Ellen J. Ferree, proof of loss of said certificate and an indemnity bond having been furnished this Corporation; and

Further resolved, That the Transfer Agent and Registrar of said First Preferred Stock be and they hereby are authorized to countersign and register said duplicate certificate.

On motion duly made, seconded and unanimously adopted, the meeting thereupon adjourned.

Ernest G. Strand, Secretary of the Meeting.

Schedule 13

(Copy)

January 9th, 1929.

The American Superpower Corporation, Dover, Delaware.

GENTLEMEN:

The undersigned corporation has been organized under the laws of the State of Delaware, with an authorized [fol. 53] capital stock of thirteen millions (13,000,000) shares, all without nominal or par value, of which one million (1,000,000) shares are to be first preferred stock, two million (2,000,000) shares are to be preference stock and ten million (10,000,000) shares are to be common stock. We enclose herewith a certified copy of our certificate of incorporation.

We have created a $3 series of preference stock, to be designated as $3 cumulative preference stock, which series is to have a dividend rate of $3 per share per annum, is to be redeemable at the price of fifty-five ($55) dollars per

share plus an amount equal to accrued dividends. Dividends are to be payable, if declared, on the first days of January, April, July and October. We enclose herewith a specimen certificate of the $3 cumulative preference stock.

We have also created, in accordance with the terms of our charter, a form of option warrant entitling the holder thereof to purchase at any time, without limit, shares of common stock of our corporation, as such stock may be constituted at the time of such purchase, at a price of twenty-seven and 50/100 ($27.50) dollars per share, subject to the further term and conditions therein stated. We enclose herewith a specimen form of option warrant.

We have issued or contracted to issue and sell, partially to J. P. Morgan & Co. and partially to Bonbright Electric Corporation, or their nominees, an aggregate amount of:

(a) Six Hundred Thousand (600,000) shares of our $3 cumulative preference stock;

(b) One million, six hundred thousand (1,600,000) shares of our common stock; and

(c) Option warrants, in the form above described, entitling the holders to purchase at any time, without limit, an aggregate amount of two million, seven hundred fourteen thousand, two hundred (2,714,200) shares of common stock at twenty-seven and 50/100 (27.50) Dollars per share.

In consideration for the issuance of such securities, we have or are to receive the following:

1. Cash in the sum of $20,371,025.76.

[fol. 54] 2. 130,565 shares of the capital stock of The United Gas Improvement Company.

3. 59,500 shares of the common stock of Public Service Corporation of New Jersey.

4. 62,360 shares of the second preferred stock of Mohawk Hudson Power Corporation.

5. 358,957 shares of the common stock of Mohawk Hudson Power Corporation.

6. 124,740 option warrants of Mohawk Hudson Power Corporation, each of such option warrants authorizing the holder thereof to purchase at any time one share of common stock of that company at $50 per share.

We understand that you have under consideration the creation of a subsidiary corporation under the laws of the state of Delaware, to be known as The Public Electric Holding Corporation, or by some other appropriate name, which corporation is hereafter referred to as the "Subsidiary Corporation" to have an authorized capital stock of ten thousand (10,000) shares with a par value of one hundred ($100) dollars each, for the purpose of transferring and delivering to that corporation eight hundred thousand (800,000) shares of the common stock of Public Service Corporation of New Jersey and Fifty-three thousand (53,000) shares of the common stock of The United Gas Improvement Company, together with cash in the amount of twenty-five ($25) dollars in consideration of the issuance and delivery to you of the entire stock of that corporation.

Subject to the necessary approval of our stockholders, we hereby offer to merge and consolidate said Subsidiary Corporation to be created by you into our corporation—the consolidated corporation to be known as The United Corporation. The terms of the proposed merger and consolidation are contained in a draft of Agreement of Merger and Consolidation, which we submit to you herewith. By the terms of this Agreement of Merger and Consolidation, you would receive thirty-four and 4187/10000 (34.4187) shares of $3 cumulative preference stock, two hundred twenty-one and 853/10000 (221.0853) shares of common stock and option warrants entitling the holder to purchase One Hun-
[fol. 55] dred (100) shares of Common Stock of the Consolidated Corporation for each share of the Capital Stock of the said Subsidiary Corporation held by you. You will thus be entitled to receive in exchange for all of the capital stock of the said subsidiary corporation held by you in the aggregate three hundred forty-four thousand, one hundred eighty-seven (344,187) shares of $3 cumulative preference stock, two million, two hundred ten thousand, eight hundred fifty three (2,210,853) shares of common stock and option warrants entitling the holder thereof to purchase one million (1,000,000) shares of common stock at twenty-seven and 50/100 ($27.50) dollars.

It is understood that, of the consideration to be received for the issue of the above shares of $3 cumulative preference stock, common stock and option warrants, fifty ($50) dollars shall constitute the consideration for the issue of

each share of $3 cumulative preference stock, one ($1) dollar shall constitute the consideration for the issue of each right represented by the above option warrants to purchase one (1) shares of the common stock of the consolidated corporation at twenty-seven and 50/100 ($27.50) dollars per share, and the balance of the consideration shall constitute the consideration received for the issue of the above mentioned common stock, and that, of the consideration received for the issue of $3 cumulative preference stock, the entire consideration, i. e., fifty ($50) dollars, will be determined to be capital and that, of the consideration received for the issue of common stock, five ($5) dollars per share will be determined to be capital and the balance of the consideration received for the common stock and the entire consideration received for the option warrants will be credited to paid-in surplus of the consolidated corporation.

By the terms of said Agreement, the holders of the stock and option warrants of our corporation will be entitled to such stock and option warrants in the merged corporation in the same amounts as their present holdings.

It is understood that the assets and liabilities of the two consolidating corporations will continue until the merger is completed, as above set forth, subject only to organiza-
[fol. 56] tion expenses and such changes as may occur by the investment of the cash of our corporation.

If this offer is acceptable to you, you will agree to proceed at once to incorporate said subsidiary corporation and to take the necessary corporate steps to complete the merger, and we agree forthwith to call the necessary directors and stockholders' meetings in regard thereto.

It is understood that the draft of Agreement of Merger and Consolidation submitted herewith is subject to such changes as may be mutually agreed upon between us.

Upon your acceptance hereof, as provided, below, this letter will constitute a contract between us, subject to the approval of our stockholders as above stated.

Very truly yours, The United Corporation, by (S.) Sherman Ewing, Vice-President.

Accepted January 9th, 1929.

The American Superpower Corporation, by (S.) H. S. Scarritt, Vice-President.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER TO AMENDED PETITION—Filed April 3, 1934

Comes now the Commissioner of Internal Revenue by his attorney, Robert H. Jackson, General Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed pursuant to leave granted March 9, 1934, admits, denies, avers and alleges as follows:

I. Admits the allegations contained in paragraph I of the amended petition.

II. Admits that the notice of deficiency was mailed to the petitioner on February 12, 1932. Denies that Exhibit A attached to the amended petition is in all respects a true and correct copy of the notice of deficiency, and avers that in addition to a number of immaterial errors the item on page 1 of the statement which now reads "$7,346.49" should be $71,346.49.

[fol. 57] III. Admits that the taxes in controversy are income taxes for the year 1929 and that the deficiency asserted by the Commissioner is $33,381.03, but denies that all of said amount is in dispute.

IV (a). Denies that the Commissioner erred as alleged in subparagraph (a) of paragraph IV of the amended petition.

(b) and (c). Denies that the Commissioner erred as alleged in sub-paragraphs (b) and (c) of paragraph IV of the amended petition. Admits, however, that in determining the deficiency the Commissioner added to taxable dividends reported by the petitioner the sum of $160,115.50 (of which the sum of $135,115.50 pertains to stock of The United Corporation) on account of certain transactions wherein petitioner acquired from The American Superpower Corporation certain rights to acquire, and actually acquired, stock of The United Corporation and The Commonwealth & Southern Corporation; but avers that as an incident thereto the Commissioner also decreased petitioner's ordinary income subject to surtax by the amount of $8,102.10 through adjusting the reported profit on the sale of 3,800 rights subsequently issued by The United Corporation; so that the net adjustment pertaining to the stock of The United Corpo-

ration did not exceed $127,013.40, and the total increase of ordinary income subject to surtax made by the Commissioner on account of said transactions did not exceed the sum of $152,013.40.

(d). Respondent further avers that in the event it be held and determined that the Commissioner did err in any respect as set forth in subparagraphs (b) and (c) of paragraph IV of the amended petition, then the Commissioner further erred in favor of the petitioner in the following respects:

(1). If said transactions did not represent corporate distributions, the Commissioner erred by overstating the cost or other basis to the petitioner of the stock of The United Corporation so acquired, and thereby understated the correct profit from the sale of 3,800 rights issued to the petitioner by The United Corporation subsequent to the transactions in question.

(2). If said transactions represent*ing* distributions, but the Commissioner erred in selecting the proper dates for valuing such distributions, then the Commissioner erred [fol. 58] through understating the amount of petitioners, taxable dividends from those sources to the extent that the fair market value of such rights on dates other than those selected by the Commissioner exceeded the respective amounts determined by the Commissioner.

(3). If said transactions represented distributions, but the amounts thereof as determined by the Commissioner exceeded the accumulated earnings and profits of The American Superpower Corporation then the Commissioner erred through failing to apply the provisions of subdivision (d) of Sec. 115 of the Revenue Act of 1928.

(4). If said transactions pertaining to stock of The United Corporation represented distributions governed by the provisions of Sec. 112 (g) of the Revenue Act of 1928, then the Commissioner erred through failing to apply the provisions of Sec. 113 (a) (9) of that Act to petitioner's holdings of Superpower and United stock, and particularly in overstating the basis of 100 shares of Superpower stock and 3,800 United rights sold by petitioner later in the year 1929.

V (a) (1). Admits the allegations contained in subparagraph (a) (1) of paragraph V of the amended petition except the conclusion in the last sentence to the effect that the amount was properly taxable as a capital gain and also the allegation that the rights were acquired on the dates indicated.

(b) (1). Admits that on or about January 25, 1929, petitioner received from The American Superpower Corporation a communication dated January 24, 1929, a copy of which is annexed to the amended petition and marked "Schedule 1". Admits that the action of the board of directors of The American Superpower Corporation referred to in said communication was taken at a meeting held on January 23, 1929. Admits that Schedule 2 attached to the amended petition is a copy of the text of the minutes of said meeting, but denies that Schedule 2 is a true and complete copy of the minutes in that certain documents referred to therein are omitted from Schedule 2, particularly the forms of purchase certificates and fractional purchase certificates submitted to the meeting and approved by the directors. Denies all other allegations of fact, if any, con-[fol. 59] tained in subparagraph (b) (1) of paragraph V of the amended petition.

(2). Admits that on February 1, 1929, petitioner received from The American Superpower Corporation a purchase certificate made out on a printed form bearing that date of which a copy is annexed to the amended petition, certifying that petitioner was entitled to acquire in accordance with the terms contained in said form 3,198 shares of common stock of The United Corporation at $25 a share, to-wit, the right to acquire at said price one share of common stock of The United Corporation for each two shares of Superpower common stock (both Class A and Class B) held by petitioner at the close of business on January 26, 1929. Admits that on February 15, 1929, petitioner paid to The American Superpower Corporation, or its agents, the sum of $79,950 and surrendered said purchase certificate, and received 3,198 shares of common stock of The United Corporation. Denies all other allegations contained in subparagraph (b) (2) of paragraph V of the amended petition.

(3). Admits that on or about May 3, 1929, petitioner received from The American Superpower Corporation a com-

munication dated May 2, 1929, a copy of which is annexed to the amended petition and marked "Schedule 4". Admits that the action of the board of directors referred to in said communication was taken at a meeting held on May 1, 1929, and that Schedule 5 annexed to the amended petition is a true copy of resolutions adopted at said meeting. Denies all other allegations contained in subparagraph (b) (3) of paragraph V of the amended petition.

(4) Admits that on May 13, 1929, petitioner received from The American Superpower Corporation a communication dated May 8, 1929, a copy of which is annexed to the amended petition as Schedule 6, enclosing a purchase certificate made out on a printed form dated May 8, 1929, of which a copy is annexed to the amended petition, certifying that petitioner was entitled to acquire in accordance with the terms contained in said form 1,599 shares of common stock of The United Corporation at $30 a share, to-wit, the right to acquire at said price one share of common stock of The United Corporation for each four shares of Superpower common [fol. 60] stock (both Class A and Class B) held by petitioner at the close of business on May 8, 1929. Admits that on May 24, 1929, petitioner paid to The American Superpower Corporation, or its agents, the sum of $47,970, and surrendered said purchase certificate, and received 1,599 shares of common stock of The United Corporation. Denies all other allegations contained in subparagraph (b) (4) of paragraph V of the amended petition.

(5). Admits that on or about June 6, 1929, the petitioner received from The American Superpower Corporation a communication dated June 5, 1929, a copy of which is annexed to the amended petition. Admits that the action referred to in said communication in respect of granting to the common shareholders of The American Superpower Corporation certain rights to acquire common stock of The Commonwealth & Southern Corporation was taken at a meeting of the board of directors of The American Superpower Corporation held on June 5, 1929. Admits that Schedule 9 annexed to the amended petition is a true copy of resolutions adopted at said meeting. Denies all other allegations contained in subparagraph (b) (5) of paragraph V of the amended petition.

(6). Admits that on June 23, 1929, petitioner received from The American Superpower Corporation a letter dated

June 22, 1929, a copy of which is annexed to the amended petition, enclosing a purchase certificate made out on a printed form dated June 22, 1929, of which a copy is annexed to the amended petition, certifying that petitioner was entitled to acquire in accordance with the terms contained in said form 3200 shares of common stock of The Commonwealth & Southern Corporation at $15 a share, to-wit, the right to acquire at said price one share of common stock of The Commonwealth & Southern Corporation for each ten shares of common stock of The American Superpower Corporation held by petitioner at the close of business on June 18, 1929. Admits that on July 2, 1929, petitioner paid to The American Superpower Corporation or its agents the sum of $48,000 and surrendered said purchase certificate, and received 3,200 shares of common stock of The Commonwealth & Southern Corporation. Denies all other allegations contained in subparagraph (b) (6) of paragraph V of the amended petition.

[fol. 61] (7), (8) and (9). Denies all the allegations contained in subparagraphs (b)(7), (8) and (9) of paragraph V of the amended petition.

(10). Denies all the allegations contained in subparagraph (b)(10) of paragraph V of the amended petition, and avers that the earnings and profits of The American Superpower Corporation were at all times equal to or in excess of all distributions, whether in money or other property, made by The American Superpower Corporation to its shareholders during the year 1929.

(11). Denies all the allegations contained in subparagraph (b)(11) of paragraph V of the amended petition.

(12). Denies that the Commissioner placed a value on the rights as of January 25, 1929, and avers that the Commissioner held that the proper date for valuing the rights issued pursuant to the resolution of January 23, 1929, was January 26, 1929. Admits that the Commissioner determined that such rights to acquire common stock of The United Corporation had a value of $12.50 for each right as of January 26, 1929. Admits that the total number of rights exercised was 1,642,944. Denies all other allegations contained in subparagraph (b)(12) of paragraph V of the amended petition.

(13). Admits that the Commissioner determined that the rights to acquire common stock of The United Corporation, issued pursuant to the resolution of May 11, 1929, had a value of $8.625 for each right as of May 8, 1929. Admits that the total number of rights exercised was 1,642,016. Denies all other allegations contained in subparagraph (b)(13) of paragraph V of the amended petition.

(14). Admits that the Commissioner determined that the rights to acquire common stock of The Commonwealth & Southern Corporation issued pursuant to the resolution of June 5, 1929, had a value of $.78⅛ for each right as of June 18, 1929. Admits that the total number of rights exercised was 8,237,480. Denies all other allegations contained in subparagraph (b)(14) of paragraph V of the amended petition.

(15). Denies all the allegations contained in subparagraph (b)(15) of paragraph V of the amended petition.

[fol. 62] (c)(1) to (9), inclusive. Admits that on January 9, 1929, the board of directors of The American Superpower Corporation held a meeting and that Schedule 12 annexed to the amended petition is a copy of the minutes thereof. Admits that under date of January 9, 1929, certain officers of The American Superpower Corporation and of The United Corporation signed a written instrument, a copy of which, except for the enclosures therein referred to, is annexed to the amended petition as Schedule 13. Denies all other allegations contained in subparagraphs (c)(1) to (9), inclusive, of paragraph V of the amended petition.

Denies generally and specifically each and every allegation contained in the taxpayer's amended petition not hereinbefore admitted, qualified or denied.

VI. In support of the allegations of error set forth in subparagraphs (d)(1) to (4), inclusive, of paragraph IV hereof respondent relies upon the following additional facts:

(1). During the year 1929 petitioner acquired by purchase three shares of common stock of The United Corporation in addition to the 3,198 shares mentioned in subparagraph (b)(2) and the 1,599 shares mentioned in subparagraph (b)(4) of paragraph IV of the amended peti-

tion, and thereby became the owner of 4,800 shares of such common stock. On or about July 10, 1929, The United Corporation issued to its common stockholders rights to subscribe to additional common stock. Petitioner received 4,800 rights, of which he sold 3,800 rights and exercised 1,000 rights. In determining the deficiency the Commissioner included in petitioner's ordinary income a profit from the sale of said rights in the amount of $8,531.70 computed as follows:

Selling price	$23,397.80
Basis as determined by Commissioner	14,866.10
	$8,531.70

The Commissioner determined that 7.4818 per cent of the basis for the common stock of The United Corporation was allocable to the rights so issued by The United Corporation. In determining the aforesaid basis of $14,866.10 the [fol. 63] Commissioner included as a part of the cost of said 4,800 shares of common stock of The United Corporation the amount of $135,115.50 mentioned in paragraph IV (c) of the amended petition. In the event it be held and determined that the issuance by The American Superpower Corporation of rights to acquire stock of The United Corporation, or the acquisition of such stock, did not represent corporate distributions, then the Commissioner overstated the correct basis to petitioner for said 3,800 rights, and understated the taxable profit from the sale thereof, by erroneously including said sum of $135,115.50 in the cost or other basis of said United stock.

(2). In determining the deficiency the Commissioner held and determined that the rights or interests in property acquired by petitioner pursuant to the resolutions of the directors of The American Superpower Corporation dated January 23, 1929, May 1, 1929 and June 5, 1929, were taxable dividends; and further held and determined that such distributions should be valued as of the dates fixed by the respective resolutions for determining the stockholders of record entitled to participate therein, viz., January 26, 1929, May 8, 1929, and *and* June 18, 1929. Other stockholders are contending that such distributions should be valued as of different dates, to-wit, the dates on which the "Purchase Certificates" were distributed or received. The

aforesaid rights to acquire stock of The United Corporation and the Commonwealth & Southern Corporation were dealt in on the New York Curb Exchange. The quoted market prices thereof, during the respective periods from the dates so used by the Commissioner and the last dates fixed for the exercise thereof, were substantially higher than the values as determined by the Commissioner. In the event it be held that the Commissioner erred in selecting the dates for valuing such distributions, then the Commissioner understated the amount of petitioner's taxable dividends from said sources to the extent that the fair market value of such rights or interests in property, on the dates when acquired or received by the petitioner, exceeded the respective amounts determined by the Commissioner.

(3). In determining the deficiency the Commissioner held and determined that when the distributions here in controversy were made The American Superpower Corporation [fol. 64] had earnings and profits accumulated after February 28, 1913, equal to or in excess of the respective amounts of such distributions as determined by the Commissioner. Accordingly, the Commissioner did not apply the provisions of subdivision (d) of Sec. 115 of the Revenue Act of 1928, which requires that distributions, if not out of earnings or profits, shall be applied against and reduce the basis of the stock, and if in excess of such basis that such excess shall be taxed in the same manner as a gain from the sale or exchange of property.

(4). As of January 1, 1929, petitioner's holdings of common stock of The American Superpower Corporation consisted of sixteen lots, to-wit, two lots for a total of 2,600 shares of Class B stock with an allocated cost or other basis ranging from $24.2208 to $44.5681 per share, and fourteen lots for a total of 3,796 shares of Class A stock with an allocated cost or other basis ranging from $21.2513 to $47.6186 per share. Early in June, 1929, petitioner acquired by purchase four additional shares (not 17) of Class A stock at a cost of $213.375 per share. On or about June 11, 1929, the common stock of The American Superpower Corporation was changed to one class only, in the ratio of five new shares for each old share of Class A and Class B stock, and in that connection petitioner received 32,000 shares of such new common stock for the 6,400 shares mentioned above.

(5). In determining the deficiency the Commissioner did not apply to petitioner's holdings of Superpower and United stock the provisions of Sec. 113(a)(9) of the Revenue Act of 1928. An allocation, pursuant thereto, of the cost or other basis of the Superpower stock between such stock and the rights or property interests acquired by petitioner pursuant to the aforesaid directors' resolutions of January 23, 1929, and May 1, 1929, would result in the determination of smaller costs or other bases to petitioner of his holdings of common stock of The American Superpower Corporation and The United Corporation than the amounts determined by the Commissioner. In the event it be held that such transactions pertaining to stock of The United Corporation represented distributions governed by the provisions of Sec. 112(g) of the Revenue Act of 1928, respondent accordingly alleges that in determining [fol. 65] the deficiency the Commissioner overstated the basis to the petitioner of the 3,800 United rights sold by petitioner later in the year 1929, and understated the taxable profit derived therefrom.

(6). In September, 1929, and within two years of petitioner's earliest acquisitions of stock of The American Superpower Corporation the petitioner sold 100 shares out of the 32,000 shares of new common stock of The American Superpower Corporation received in June, 1929. In determining the deficiency the Commissioner included in ordinary income a profit from the disposition of said 100 shares of stock in the amount of $5,565.00 computed as follows:

Selling price received by petitioner	$6,116.00
Basis as determined	551.00
	$5,565.00

Respondent accordingly alleges that if the Commissioner erred in failing to apply either Sec. 115(d) or Sec. 113(a)(9) of the Revenue Act of 1928, then the taxable profit derived from the sale of said 100 shares of stock was understated by the Commissioner in determining the deficiency.

Wherefore, it is prayed that the appeal be denied; and that the Board redetermine the correct amount of the deficiency for 1929 to be equal to the amount determined by the Commissioner, viz., $33,381.03, plus any and all addi-

tional amounts which may result from the correction of any errors made by the Commissioner. The Commissioner hereby makes claim pursuant to the provisions of Sec. 272(e) of the Revenue Act of 1928 for the increased deficiency resulting from such redetermination.

Robert H. Jackson, General Counsel, Bureau of Internal Revenue.

Of Counsel: F. R. Shearer, E. L. Updike, Special Attorneys, Bureau of Internal Revenue.

[fol. 66] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

REPLY TO RESPONDENT'S ANSWER—Filed April 20, 1934

Now comes the petitioner, by counsel, and in reply to affirmative matters alleged in respondent's answer to petitioner's amended petition, admits, denies, avers and alleges, as follows:

IV (d). With reference to the allegations in paragraphs (d)(1) (2) (3) and (4) of respondent's answer, your petitioner avers that said paragraphs contain wholly conclusions of law and therefore do not require a reply thereto.

VI (1). Petitioner admits the purchase of three shares of common stock of the United Corporation in addition to the shares held by him mentioned in paragraphs (b)(2) and (b)(4) of the amended petition, and that he was the owner of 4,800 shares of such common stock. He admits that on or about July 10, 1929, the United Corporation issued to its common stockholders rights to subscribe to additional common stock. Admits petitioner received 4,800 rights, of which he sold 3,800 rights and exercised 1,000 rights. Admits that the Commissioner included a profit from the sale of said rights in the amount of $8,531.70. Admits that the Commissioner determined that 7.4818 per cent of the basis was allocable to the rights so issued. Admits that the Commissioner included as part of the cost of said 4,800 shares the amount of $135,115.50 mentioned in paragraph IV (c) of the amended petition, and denies each and every fact alleged in said paragraph VI (1) not herein specifically ad-

mitted. With reference to the last sentence in said paragraph, petitioner avers that said sentence is a conclusion of law, and therefore does not require a reply thereto.

VI (2). Admits that the Commissioner of Internal Revenue determined the issuance of rights by the American Superpower Corporation to petitioner on January 23, 1929, May 1, 1929 and June 15, 1929, constituted taxable dividends, and further determined that such rights for dividend purposes should be valued as of the date fixed by the respective resolutions for determining the stockholders of record entitled to participate therein, viz., January 26, 1929, [fol. 67] May 8, 1929 and June 18, 1929. Neither admits nor denies that other stockholders are contending that such distribution should be valued as of different dates but demands strict proof thereof. Admits that the rights to acquire stock of The United Corporation and the Commonwealth & Southern Corporation were dealt in on the New York Curb Exchange. Neither admits nor denies that the quoted market prices thereof during the respective periods from the dates so used by the Commissioner and the last dates fixed for the exercise thereof were substantially higher than the values as determined by the Commissioner but demands strict proof thereof. Denies each and every other allegation of fact in said paragraph not herein specifically admitted. With reference to the last sentence in said paragraph, petitioner states that said sentence is a conclusion of law, and as such, does not require a reply thereto.

VI (3). Denies that the Commissioner held and determined that when the distributions here in controversy were made, The American Superpower Corporation had earnings and profits accumulated after February 28, 1913, equal to or in excess of the respective amounts of such distributions as determined by the Commissioner. Admits that the Commissioner did not apply the provisions of subdivision (d) of Section 115 of the Revenue Act of 1928, and denies each and every other allegation in said paragraph not herein specifically admitted.

VI (4). Admits the allegations of said paragraph.

VI (5). Admits that in determining the deficiency, the Commissioner did not apply the provisions of Section 113 (a) (9) of the Revenue Act of 1928. Neither admits nor

denies that an allocation, pursuant thereto, of the stock acquired as a result of the directors' resolutions of January 23, 1929 and May 1, 1929, would result in a determination of smaller costs or other bases, but demands strict proof. Petitioner denies each and every other allegation not herein specifically admitted. Petitioner says that the last sentence of said paragraph is a conclusion of law and such sentence, therefore, does not require a reply thereto.

VI (6). Admits that the petitioner sold 100 shares of stock of The American Superpower Corporation in September, [fol. 68] 1929, being a part of 32,000 shares of new common stock of The American Superpower Corporation received in June, 1929. Admits that in determining the deficiency, the Commissioner included in ordinary income a profit from the disposition of said 100 shares of stock in the amount of $5,565. Denies each and every other allegation of fact in said paragraph contained not herein specifically admitted. Petitioner says that the last sentence in said paragraph is a conclusion of law, and therefore does not require a reply thereto.

Wherefore, your petitioner prays that relief be granted as prayed for in its amended petition.

A. Mitchell Palmer, Wm. D. Harris, Francis V. Barstow, Attorneys for Petitioner.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS—Filed at Hearing April 4, 1934

It is hereby stipulated and agreed by and between the parties hereto that the following statement of facts in addition to those admitted by the pleadings shall be taken as true for the purpose of determining this proceeding, provided, however, that each party may introduce further testimony and evidence not inconsistent with the facts stipulated herein.

1. During the year 1929 petitioner was the owner of certain stock of International Telephone and Telegraph Company and certain stock of Electric Bond and Share Company. During the year 1929 said corporations issued to their stockholders rights to subscribe to additional

shares of their stock. Instead of exercising said rights petitioner, during the year 1929, sold 1,125 rights of International Telephone and Telegraph Company for $5,143.75 and sold 2,358 rights of Electric Bond and Share Company for $22,216.25, a total consideration of $27,360.00. In his income tax return for the year 1929 petitioner, pursuant to Article 58 of Regulations 74, reported the entire proceeds from the sale of said stock rights without appor- [fol. 69] tioning thereto any part of the cost or other basis of the stock in respect of which the rights had been issued. The petitioner in his return reported said sum of $27,360.00 as an item of capital gain and not as an item of ordinary income. In determining the deficiency set out in the notice of deficiency, the Commissioner included said sum of $27,-360.00. in petitioner's gross income as ordinary income. The shares of stock in respect of which said rights were issued had been held by petitioner for more than two years prior to the respective dates of sale of said rights.

2. On January 1, 1929, petitioner was the owner of 3,796 shares of Class A and 2,600 shares of Class B common stock of The American Superpower Corporation, a corporation organized and existing under the laws of Delaware. This stock was acquired by petitioner on and after September 22, 1927. The total cost or other basis to petitioner of said Class A and Class B stock, after giving effect to preferred stock dividends, was $110,479.97 for the 3,796 shares of Class A stock and $65,009.03 for the 2,600 shares of Class B stock. On June 10, 1929 petitioner acquired four additional shares of Class A stock at a cost of $853.50. On or about June 11, 1929 the common stock of The American Superpower Corporation was changed to one class only, and in connection therewith five shares of such stock were issued for each share of Class A and Class B common stock. Petitioner received 32,000 shares of such new common stock for said 6,400 shares of Class A and Class B common stock mentioned above.

3. In January, 1929, prior to January 23, 1929, The American Superpower Corporation acquired, in the manner hereinafter set forth, 2,210,853 shares of common stock of The United Corporation, a corporation organized and existing under the laws of the State of Delaware. On

January 23, 1929 the board of directors of American Superpower Corporation adopted certain resolutions, pursuant to which the holders of its Class A and Class B common stock were given the right to acquire from the corporation a portion of its holdings of the common stock of United Corporation. Schedule 2 attached to the amended petition is a true and correct copy of the minutes of the meeting of the board of directors of The American Superpower Corporation held on January 23, 1929, with the exception [fol. 70] of the copies of the forms of purchase certificate and fractional purchase certificate which were attached thereto. Schedule 3 attached to the amended petition is a true copy of the purchase certificate which was attached to said minutes, the form of fractional purchase certificate attached to said minutes is immaterial to any issue involved in this case. Said Schedules 2 and 3 attached to the amended petition are by reference made a part hereof. On January 30, 1929, pursuant to the provisions of the aforesaid resolutions The American Superpower Corporation delivered to J. P. Morgan and Company, the transfer agents for the common stock of The United Corporation, certificate representing 821,472 shares of such common stock, with instructions to transfer not in excess of that number of shares into such names as might be directed by Central Union Trust Company.

4. On or about January 25, 1929 petitioner received from The American Superpower Corporation a communication dated January 24, 1929. Schedule 1 attached to the amended petition is a true copy of said communication and is by reference made a part hereof.

5. On February 1, 1929 petitioner received from The American Superpower Corporation a certificate mailed January 31, 1929 and dated February 1, 1929 certifying that petitioner, as the holder of record on January 26, 1929 of 6,396 shares of Class A and Class B common stock of American Superpower Corporation, was entitled to acquire from that corporation on or before February 15, 1929, upon the terms and conditions therein stated, a total of 3,198 shares of common stock of United Corporation at a price of $25 per share, to wit, the right to acquire at said price one share of common stock of United Corporation for each two shares of American Superpower Corporation Class A and Class B common stock held by petitioner at the close

of business on January 26, 1929. Said certificate dated February 1, 1929 was prepared on the form of purchase certificate which is attached to the amended petition as Schedule 3. On January 31, 1929 similar certificates, all dated February 1, 1929, and prepared on the forms of purchase certificate and fractional purchase certificate mentioned in Schedule 2 of the amended petition, were mailed by American Superpower Corporation to all of its Class A and Class B common stockholders of record on January 26, 1929.

[fol. 71] 6. On February 15, 1929 petitioner paid to American Superpower Corporation, or its agents, the sum of $79,950 in cash, surrendered the certificate which he had received from said corporation, and received 3,198 shares of United Corporation common stock.

7. On January 26, 1929 the number of shares of Class A and Class B common stock of The American Superpower Corporation outstanding was 1,642,944 and the number of rights issued was 1,642,944. All of the rights so issued were exercised on or before February 15, 1929.

8. Starting on January 25, 1929 said rights were dealt in on the New York Curb Exchange. The number of such rights dealt in on said exchange and the prices thereof were as follows:

Date 1929		Number of rights dealt in	High	Low
January	25	11,000	12 3/8	11 5/8
	26	8,500	12 7/8	12 1/8
	28	44,100	17 1/2	12 5/8
	29	5,100	18 3/8	17 1/8
	30	15,600	21	18 5/8
	31	11,500	19 5/8	17 3/8
February	1	11,700	18	16 1/4
	2	7,100	17	15 1/2
	4	17,400	16 1/8	15
	5	14,000	16 3/4	15
	6	17,600	16 3/4	14 1/8
	7	10,800	14 7/8	12 1/8
	8	9,000	14 7/8	12 1/4
	11	12,000	14	12 5/8
	13	15,400	15 7/8	12 3/8
	14	20,400	12 7/8	11 5/8
	15	1,200	13 1/4	12 3/8

9. In connection with determining the deficiency against petitioner in this proceeding and in connection with the audit of returns of other stockholders of American Superpower Corporation the Commissioner found and held that the rights issued by American Superpower Corporation and evidenced by said certificates dated February 1, 1929, [fol. 72] as set forth above, represented the distribution of taxable dividends, and determined the amount of such dividends to be the fair market value of said rights on January 26, 1929. The Commissioner further found and determined that on January 26, 1929 each of the rights so issued had a fair market value of $12.50. In determining the deficiency asserted in the notice of deficiency, the Commissioner included in petitioner's gross income as dividends $79,950 on account of the rights mentioned in paragraph 5 hereof. Said amount of $79,950 was computed as follows:

Number of rights received by petitioner	6,396
Market value of said rights, 6,396 multiplied by $12.50	$79,950.00

10. On May 1, 1929 the board of directors of American Superpower Corporation adopted certain resolutions, pursuant to which the holders of its Class A and Class B stock were given the right to acquire from the corporation a portion of its holdings of common stock of United Corporation. A true and complete copy of said resolutions is attached to the amended petition as Schedule 5 and is by reference made a part hereof. On May 10, 1929, pursuant to the aforesaid resolutions of May 1, 1929, The American Superpower Corporation delivered to J. P. Morgan and Company, the transfer agents for the common stock of The United Corporation, certificates representing a total of 410,804 shares of such common stock, with instructions to transfer not in excess of that number of shares into such names as might be directed by the Central Union Trust Company.

11. On or about May 3, 1929 petitioner received from American Superpower Corporation a communication dated May 2, 1929. Schedule 4 attached to the amended petition is a true copy of said communication and is by reference made a part hereof.

12. On May 13, 1929 petitioner received from The American Superpower Corporation a communication mailed May

12, 1929 and dated May 8, 1929. A true copy of said communication is attached to the amended petition as Schedule 6 and is by reference made a part hereof. Accompanying said communication was a certificate dated May 8, 1929 certifying that petitioner, as the holder of record on May 8, 1929 of 6,396 shares of Class A and Class B common stock [fol. 73] of The American Superpower Corporation, was entitled to acquire from that corporation on or before May 24, 1929, upon the terms and conditions therein stated, a total of 1,599 shares of common stock of United Corporation at a price of $30 per share; to wit, the right to acquire at said price one share of common stock of United Corporation for each four shares of the American Superpower Corporation, Class A and Class B common stock held by petitioner at the close of business on May 8, 1929. The document attached to the amended petition as Schedule 7 is a true copy of the form on which said certificate was prepared. Said Schedule 7 is by reference made a part hereof. On May 12, 1929 similar certificates, all dated May 8, 1929, were mailed by The American Superpower Corporation to all its Class A and Class B common stockholders of record on May 8, 1929.

13. On May 24, 1929 petitioner paid to The American Superpower Corporation $47,970 in cash, surrendered the certificate mentioned above, and received from said corporation 1,599 shares of common stock of United Corporation.

14. On May 8, 1929 the number of shares of Class A and Class B common stock of The American Superpower Corporation outstanding was 1,643,216 and the number of rights issued was 1,643,216. Of the rights so issued, 1,642,016 were exercised on or before May 24, 1929.

15. Starting on May 2, 1929 said rights were dealt in on the New York Curb Exchange. The number of such rights dealt in on said exchange and the prices thereof were as follows:

Date 1929		Number of rights dealt in	High	Low
May	2	43,500	7¼	6⅛
	3	53,100	8½	7⅜
	4	53,200	9⅛	8⅛
	6	73,700	9⅞	8¼
	7	82,000	9¼	8⅜

Date 1929	Number of rights dealt in	High	Low
8	19,800	8 7/8	8 3/8
9	100,300	9 1/2	8 7/8
10	137,700	10 5/8	9 1/4
11	64,100	11 3/8	10 3/4
[fol. 74]			
13	72,100	10 5/8	9 1/4
15	22,800	10 1/8	9 1/4
16	16,300	9 5/8	8 3/4
17	33,800	9 5/8	9
18	8,800	9 1/4	8 7/8
20	17,000	9 1/8	8 5/8
21	20,000	8 1/2	7 3/4
22	53,400	8 1/8	7 1/8
23	28,700	8 3/8	7

16. In connection with determining the deficiency against the petitioner in this proceeding and in connection with the audit of returns of other stockholders of The American Superpower Corporation, the Commissioner found and held that the rights issued by The American Superpower Corporation and evidenced by said certificates dated May 8, 1929, as set forth above, represented the distribution of taxable dividends, and determined the amount of such dividends to be the fair market value of said rights on May 8, 1929. The Commissioner further found and determined that on May 8, 1929 each of the rights so issued had a fair market value of $8,625. In determining the deficiency asserted in the notice of deficiency, the Commissioner included in petitioner's gross income as dividends $55,165.50 on account of the rights mentioned in paragraph 12 hereof. Said amount of $55,165.50 was computed as follows:

Number of rights received by petitioner	6,396
Market value of said rights, 6,396 multiplied by $8,625	$55,165.50

17. Prior to June 18, 1929 The American Superpower Corporation acquired certain shares of the common stock of The Commonwealth & Southern Corporation, a corporation organized under the laws of Delaware on May 23, 1929. On June 5, 1929 the board of directors of American Superpower Corporation adopted certain resolutions, pursuant to which the holders of its common stock were given the right

to acquire from the corporation a portion of its holdings of the common stock of The Commonwealth & Southern Corporation. A true copy of said resolutions is attached to the amended petition as Schedule 9 and is by reference [fol. 75] made a part hereof. On the respective dates indicated below, pursuant to the provisions of the aforesaid resolutions of June 5, 1929, The American Superpower Corporation delivered to The Commonwealth & Southern Corporation, which acted as its own transfer agent for its common stock, certificates representing a total of 824,231 shares of common stock of The Commonwealth & Southern Corporation with instructions to transfer not in excess of that number of shares into such names as the Central Hanover Bank and Trust Company might direct. Of said total number of shares, certificates representing 400,000 shares were delivered on June 24, 1929, certificates representing 100,000 shares on June 27, 1929, and certificates representing 324,231 shares on July 1, 1929.

18. On or about June 6, 1929 petitioner received from The American Superpower Corporation a communication dated June 5, 1929. A true copy of said communication is attached to the amended petition as Schedule 8 and is by reference made a part hereof.

19. On June 23, 1929 petitioner received from The American Superpower Corporation a letter mailed June 22, 1929 and dated June 22, 1929. A true copy of said letter is attached to the amended petition as Schedule 10 and is by reference made a part hereof. Accompanying said letter was a certificate dated June 22, 1929, certifying that petitioner, as the holder of record on June 18, 1929 of 32,000 shares of common stock of The American Superpower Corporation, was entitled to acquire from that Corporation on or before July 2, 1929, upon the terms and conditions therein stated, a total of 3,200 shares of common stock of Commonwealth & Southern Corporation at a price of $15 per share, to wit, the right to acquire at said price one share of Commonwealth & Southern Corporation Common stock for each ten shares of the American Superpower Corporation common stock held by petitioner at the close of business on June 18, 1929. The document attached to the amended petition as Schedule 11 is a true copy of the form on which said certificate was prepared. Said Schedule 11 is by reference made a part hereof. On June 22, 1929 similar

certificates, all dated June 22, 1929, were mailed by American Superpower Corporation to all its common stockholders of record on June 18, 1929.

[fol. 76] 20. On July 2, 1929 petitioner paid to The American Superpower Corporation, or its agents, the sum of $48,000 in cash, surrendered the certificate which he had received from said corporation, and received 3,200 shares of common stock of The Commonwealth & Southern Corporation.

21. On June 18, 1929 the number of shares of common stock of The American Superpower Corporation outstanding was 8,242,310 and the number of rights issued was 8,242,310. Of the rights so issued, 8,237,480 were exercised on or before July 2, 1929.

22. Starting on June 6, 1929 said rights were dealt in on the New York Curb Exchange. The number of such rights dealt in on said exchange and the prices thereof were as follows:

Date 1929	Number of rights dealt in	High	Low
June 6	58,000	1 1/2	1 1/8
8	10,800	1 1/4	1
10	71,000	1 1/8	1
11	13,000	1	7/8
12	125,800	15/16	9/16
13	20,800	7/8	3/4
14	10,700	1	7/8
15	28,900	1 1/16	7/8
17	9,400	1 1/16	7/8
18	93,100	7/8	11/16
19	74,400	15/16	13/16
20	39,200	15/16	3/4
21	26,900	7/8	3/4
22	23,900	13/16	3/4
24	68,200	7/8	3/4
25	63,100	7/8	3/4
26	117,500	7/8	3/4
27	322,600	1 1/16	13/16
28	133,000	1 1/4	1 1/16
29	32,100	1 15/16	1 3/16
July 1	65,300	1 3/8	1 1/8
2	1,000	1 5/8	1 3/8

[fol. 77] 23. In connection with determining the deficiency against petitioner in this proceeding and in connection with the audit of returns of other stockholders of The American Superpower Corporation, the Commissioner found and held that the rights issued by The American Superpower Corporation and evidenced by said certificates dated June 22, 1929, as set forth above, represented the distribution of taxable dividends, and determined the amount of such dividends to be the fair market value of said rights on June 18, 1929. The Commissioner further found and determined that on June 18, 1929 each of the rights so issued had a fair market value of $.78125. In determining the deficiency asserted in the notice of deficiency, the Commissioner included in petitioner's gross income as dividends $25,000 on account of the rights mentioned in paragraph 19 hereof. Said amount of $25,000 was computed as follows:

Number of rights received by petitioner	32,000
Market value of said rights, 32,000 multiplied by $.78125	$25,000.00

24. On its books of account The American Superpower Corporation made no charge against nor deduction from its profit and loss or earnings account, its earned surplus account, or its paid-in surplus account, in connection with or as a result of the issuance of the "Purchase Certificates" pursuant to the provisions of the aforesaid resolutions of January 23, 1929, May 1, 1929, and June 5, 1929.

25. The United Corporation was incorporated under the laws of Delaware on January 7, 1929, at the instance of J. P. Morgan and Company, Drexel and Company and Bonbright and Company. A copy of its original charter will be offered in evidence as a separate exhibit at the hearing of this proceeding. The formation of The United Corporation was the outgrowth of an agreement entered into in March, 1928, between the representatives of certain minority stockholders of the Public Service Corporation of New Jersey and The United Gas Improvement Company. The parties thereto were J. P. Morgan and Company, New York, New York, Bonbright and Company, New York, New York (who controlled The American Superpower Corporation), Drexel and Company, Philadelphia, Pennsylvania (who were bankers for Public Service Corporation of New Jersey and [fol. 78] United Gas Improvement Company), the Mellon in-

terests of Pittsburgh (later succeeded by the Koppers Company), Day and Zimmerman and associates, Philadelphia, Pennsylvania, S. T. Bodine and S. Z. Mitchell (who were connected officially with the utility companies above mentioned). In substance, the agreement was not to buy or sell further stocks in the companies involved except with the general knowledge of the group, and that the parties would act in unison and thus prevent the acquisition of a controlling ownership by others. Later in 1928, J. P. Morgan and Company acquired a substantial minority interest in Mohawk Hudson Power Corporation, which stock was also included in the above arrangement. The owners and the description of the securities affected by the agreement, as of the end of 1928, were as follows:

J. P. Morgan and Company and Drexel and Company	350,957 shares M. H. P. Corp.	common
	62,360 shares M. H. P. Corp.	preferred
	124,740 shares M. H. P. Corp.	warrants
	59,500 shares P. S. Corp., N. J.	common
	130,565 shares U. G. I. Co.	common
American Superpower Corporation	800,000 shares P. S. Corp., N. J.	common
	53,000 shares U. G. I. Co.	common
The Koppers Company	20,461 shares U. G. I. Co.	common
Day and Zimmerman and associates	32,000 shares U. G. I. Co.	common
S. T. Bodine	1,000 shares P. S. Corp., N. J.	common
	1,500 shares U. G. I. Co.	common
S. Z. Mitchell (or Electric Investors, Inc.)	46,116 shares P. S. Corp., N. J.	common
	2,000 shares U. G. I. Co.	common

26. As the result of further negotiations it was determined in December, 1928, to organize a holding company (United Corporation) to which the above described securities should be transferred in exchange for stocks and securities of the proposed holding corporation. The representatives of Bon-

[fol. 79] bright and Company in these negotiations were also officers of The American Superpower Corporation. On December 26, 1928, a final agreement was reached between the interested parties that The United Corporation should be organized and that the above-mentioned securities should be transferred to the new corporation, the same exchange values applying to all parties alike. At a further conference on January 2, 1929, at the offices of J. P. Morgan and Company in New York City, the respective contributions of the participants were definitely fixed, and the basis on which each was to receive stock and securities of The United Corporation was definitely agreed upon. It was also agreed that J. P. Morgan and Company and Bonbright and Company would each subscribe for and take stock and securities in the new corporation to the amount of $10,000,000 in cash. To this point the negotiations and agreements were entirely oral. After its formation on January 7, 1929, and on or about the dates indicated below, The United Corporation acquired the certificates evidencing the above-described securities and issued to the respective parties certificates evidencing its securities, as follows:

From	Date
J. P. Morgan and Company (or Drexel and Company)	January 11, 1929
The American Superpower Corporation	January 14, 1929
Koppers Company	January 23, 1929
Day and Zimmerman and associates	January 23, 1929
S. T. Bodine	January 23, 1929
S. Z. Mitchell (or Electric Investors, Inc.)	January 23, 1929

On January 11, 1929, J. P. Morgan and Company also paid in to The United Corporation the sum of $700,801.10 in cash as part of the consideration for the United securities mentioned above. This cash contribution was in substitution for the sum of $371,025.76 mentioned in the written agreements referred to below on account of their inability to deliver 8,000 shares of common stock of Mohawk Hudson Power Corporation.

27. The acquisition of the aforesaid certificates of stock by The United Corporation was accomplished in the following manner:

On January 7, 1929, The United Corporation was or-
[fol. 80] ganized as stated above. On January 8, 1929, a

written agreement was entered into between J. P. Morgan and Company and The United Corporation, a copy of which is hereto attached, made a part hereof and marked "Exhibit B". On January 9, 1929, J. P. Morgan and Company, by letter of that date addressed to The United Corporation, agreed to acquire certain additional securities from The United Corporation for $10,000,000 cash; and agreed to effect the exchange provided for in the agreement of January 8, on January 15, 1929. By another letter dated January 9, 1929, J. P. Morgan and Company supplemented said agreement of January 8, and the above-mentioned letter of January 9, by changing the delivery date of the securities to January 10, and fixing January 11, as the date for payment of the $10,000,000. Copies of said two letters of January 9, 1929 (except the enclosure referred to in the first letter), are attached hereto, made a part hereof and marked "Exhibit C" and "D". At or about the same time the Bonbright Electric Corporation (nominee of Bonbright and Company) entered into a written agreement with The United Corporation, similar to Exhibit C, with respect to its agreed cash contribution of $10,000,000.

On January 9, 1929, the board of directors of The United Corporation approved the form of a written proposal bearing that date to be made to The American Superpower Corporation. On the same date the written proposal in the form so approved was submitted to and accepted by the board of directors of The American Superpower Corporation. A true and correct copy of the minutes of the meeting of the board of directors of The American Superpower Corporation held on January 9, 1929, is attached to the amended petition as Schedule 12 and is by reference made a part of this stipulation. A true and correct copy of said proposal dated January 9, 1929, is attached to the amended petition as Schedule 13 and is by reference made a part hereof.

On January 10, 1929, The American Superpower Corporation caused to be incorporated under the laws of Delaware a corporation known as The Public Electric Holding Corporation with an authorized capital stock of 10,000 shares of the par value of $100 each. Attached hereto, made a part hereof and marked "Exhibit E" is a photostat copy of an [fol. 81] original instrument bearing date January 11, 1929, executed by The American Superpower Corporation and by

The Public Electric Holding Corporation. Attached hereto, made a part hereof and marked "Exhibit F" is a photostat copy of an original instrument bearing date January 11, 1929, executed by The American Superpower Corporation. Attached hereto, made a part hereof and marked "Exhibit G" is a photostat copy (both the face and reverse sides) of Certificate No. 1, dated January 11, 1929, for 10,000 shares of the capital stock of The Public Electric Holding Corporation, which is the only certificate of stock ever issued by said corporation. The A. P. Taliaferro mentioned in said documents was treasurer of The American Superpower Corporation.

On January 12, 1929, a document dated January 11, 1929, entitled "Agreement of Merger and Consolidation Between the United Corporation and the Public Electric Holding Corporation Continuing The United Corporation" was filed in the office of the Secretary of State of the State of Delaware. A certified copy of said document will be offered in evidence as a separate exhibit at the hearing of this proceeding.

On or about January 17, 1929, The United Corporation and Messrs. Day and Zimmerman executed a written agreement dated January 12, 1929, a true and correct copy of which (except the enclosures referred to) is attached hereto, made a part hereof and marked "Exhibit H". At or about the same time similar agreements, except for the names of the parties and the amounts and descriptions of the securities involved, were executed by the Koppers Company, S. T. Bodine, and S. Z. Mitchell or his nominee.

28. The various legal steps set forth in paragraph 27 were matters which were left to and formulated by counsel, and were not specifically a part of the subject matter of the oral negotiations and agreements mentioned in paragraph 26 of this stipulation. The Public Electric Holding Corporation was organized solely for the purposes indicated in the proposal dated January 9, 1929 (Schedule 13 attached to the amended petition). It did not transact any business, other than to do the things as set forth in this [fol. 82] stipulation; and did not open or maintain books of account, nor file a Federal income tax return for the period of its existence.

On January 14, 1929, The American Superpower Corporation mailed to each of its stockholders a communication reading as follows:

"The American Superpower Corporation

Dover, Del., January 14, 1929.

"To the Stockholders of The American Superpower Corporation:

"We take pleasure in announcing that The American Superpower Corporation, by unanimous vote of its Board of Directors, has acquired large holdings in the $3 Cumulative Preference Stock, Common Stock and Option Warrants of The United Corporation, which was recently organized under the Delaware Laws, by Messrs. J. P. Morgan & Co., Drexel & Co., and Bonbright & Company, Incorporated. The consideration paid was the transfer to The United Corporation of the holdings of The American Superpower Corporation in Public Service Corporation of New Jersey and The United Gas Improvement Company. The American Superpower Corporation is now one of the largest holders of the Common Stock of The United Corporation.

"The United Corporation has also acquired additional blocks of the stocks of the Public Service Corporation of New Jersey and the United Gas Improvement Company, and also a substantial interest in Mohawk Hudson Power Corporation. The United Corporation presently will have assets consisting of cash in excess of $20,000,000 and stocks and other securities representing a cost to it of approximately $135,000,000, which is substantially less than their present market quotations. Your Board believes the acquisition of these holdings in The United Corporation by The American Superpower Corporation to be a further step in the progress of your company.

"The net market value of the assets of The American Superpower Corporation, at the close of business on Jan- [fol. 83] uary 7th, 1929, before the consummation of the above transaction, was approximately $170,000,000.

"By Order of the Board of Directors.

"Ernest G. Strand, Secretary."

In connection with the Federal income tax case of one of the associates of Day and Zimmerman for the year 1929, the Commissioner of Internal Revenue held and determined that the transfer to The United Corporation of the securities listed in paragraph 25 of this stipulation constituted a transaction which was within the provisions of and governed by Part (5) of subdivision (b) of Section 112 of the Revenue Act of 1928, notwithstanding that the transfer of the holdings of The American Superpower Corporation was effected through the medium of The Public Electric Holding Corporation.

29. In connection with certain of the conferences which preceded the formation of The United Corporation, the matter of the disposition by The American Superpower Corporation of a part of the stock of The United Corporation to be received by it was discussed. Mr. Harold Stanley of the firm of J. P. Morgan and Company initiated such discussion. In that connection Mr. Alfred L. Loomis of Bonbright and Company (who was also chairman of The American Superpower Corporation) stated to some of the other parties to the negotiations, including Mr. Stanley, that at the first meeting of the board of directors of The American Superpower Corporation which would be called to consider the acquisition by The United Corporation of the common stock of the Public Service Corporation of New Jersey and the common stock of The United Gas Improvement Company held by The American Superpower Corporation he intended to advise the board that the officers of The American Superpower Corporation expected to submit to the board at some later date a proposition by which The American Superpower Corporation would dispose of a substantial part of the stock of The United Corporation to be so acquired. As the result of such discussion Mr. Stanley reached the conclusion that The American Superpower Corporation would distribute a substantial portion of the common shares of The United Corporation to the shareholders of The American Superpower Corporation [fol. 84] at such time or times and upon such terms as that company should determine. At the meeting of the board of directors of The American Superpower Corporation held on January 9, 1929, Mr. Loomis advised the board substan-

tially in accordance with his statement of intention as set forth above. Immediately following said meeting of January 9, 1929, in consultation with other officers of The American Superpower Corporation, Mr. Loomis formulated the exact proposal for distribution of rights set forth in Schedule 2 attached to the amended petition. Subsequently, in May 1929, the same officers also formulated a proposition to make a further distribution of rights to acquire common stock of The United Corporation, which was submitted to the board of directors of The American Superpower Corporation at its meeting of May 1, 1929, and the exact terms of which are embodied in Schedule 5 attached to the amended petition.

30. The exchange values for the securities transferred to The United Corporation, as agreed upon by the participants in the formation of The United Corporation for the purpose of determining their relative proportions of the securities to be issued by The United Corporation, were as follows:

Mohawk Hudson Power Corporation, common stock	$41¼	per share
Mohawk Hudson Power Corporation, second preferred stock	$107	per share
Mohawk Hudson Power Corporation, warrants	$20	per warrant
Public Service Corporation of New Jersey, common stock	$80	per share
United Gas Improvement Company, common stock	$160	per share

The following is a description of the securities and cash acquired by The United Corporation on and prior to January 23, 1929 and of the values attributable thereto on the foregoing basis:

[fol. 85]

Source	Description	Amount	
J. P. Morgan & Co.	350,957 M. H. P. Corp. Common.....	$14,481,478.90	
	62,360 M. H. P. Corp. Second Preferred	6,672,620.00	
	124,740 M. H. P Corp. Warrants.....	2,494,800.00	
	59,500 P. S. Corp. of N. J. Common..	4,760,000.00	
	130,565 U. G. I. Co. Common.....	20,890,400.00	
	Check for cash.....	700,801.10	
			$50,000,000
American Superpower Corp.....	800,000 P. S. Corp. of N. J. Common..	$64,000,000.00	
	53,000 U. G. I. Co. Common.....	8,480,000.00	
	Check for cash.....	25.00	
			72,480,025
Koppers Company..	20,461 U. G. I. Co. Common.....		3,273,760
Day & Zimmerman and associate.....	32,000 U. G. I. Co. Common.....		5,120,000
S. T. Bodine.....	1,000 P. S. Corp. of N. J. Common..	$80,000.00	
	1,500 U. G. I. Co. Common.....	240,000.00	
			320,000
S. Z. Mitchell.....	46,116 P. S. Corp. of N. J. Common.:	$3,689,280.00	
	2,000 U. G. I. Co. Common.....	320,000.00	
			4,009,280
		Subtotal in connection with exchanges.....	$135,203,065
J. P. Morgan & Co.	Check for cash subscription.....		10,000,000
Bonbright Electric Corporation.....	Check for cash subscription.....		10,000,000
	Grand Total.....		$155,203,065

In consideration therefor The United Corporation issued its stock and option warrants as follows:

To whom issued	$3 Preference Shares	Common Shares	Warrants
J. P. Morgan and Company (for the exchange).....	600,000	800,000	714,200
American Superpower Corporation.....	344,187	2,210,853	1,000,000
Koppers Company.....	15,500	99,850	45,178
Day and Zimmerman and associates.....	24,320	156,160	70,656
S. T. Bodine.....	1,520	9,760	4,416
S. Z. Mitchell or nominee.....	19,044	122,283	55,328
Subtotal.....	1,004,621	3,398,906	1,889,778

[fol. 86]

J. P. Morgan and Company (cash subscription).....	.....	400,000	1,000,000
Bonbright Electric Corporation.....	.....	400,000	1,000,000
Grand Total.....	1,004,621	4,198,906	3,889,778

31. The common stock of Public Service Corporation of New Jersey was listed and dealt in on the New York Stock Exchange. The common stock, second preferred stock and warrants of Mohawk Hudson Power Corporation, and the common stock of United Gas Improvement Company, were dealt in on the New York Curb Exchange. The following tabulation discloses the market prices of said securities for the weeks ending Friday, January 11, 1929, January 18, 1929, and January 25, 1929, as disclosed by sales made on the New York Stock Exchange and the New York Curb Exchange:

Security	Week Ended	Number of Shares or Warrants Sold	Week's Range of Prices Low	High
Public Service Corporation of New Jersey	January 11, 1929	262,100	81⅝	88½
	January 18, 1929	113,000	82⅛	87¾
	January 25, 1929	201,400	86¼	91⅝
United Gas Improvement Company common	January 11, 1929	63,400	161⅝	174
	January 18, 1929	41,200	166⅛	174⅜
	January 25, 1929	87,300	170⅛	179½
Mohawk Hudson Power Corporation common	January 11, 1929	36,300	55	73
	January 18, 1929	8,600	59	68½
	January 25, 1929	6,000	66	70⅜
Mohawk Hudson Power Corporation second preferred	January 11, 1929	300	107¼	110
	January 18, 1929	335	108	109
	January 25, 1929	50	107½	109½
Mohawk Hudson Power Corporation warrants	January 11, 1929	11,900	25⅛	43
	January 18, 1929	4,250	28	34
	January 25, 1929	5,400	32½	34¼

32. The 800,000 shares of common stock of Public Service Corporation of New Jersey and the 53,000 shares of common stock of United Gas Improvement Company were car- [fol. 87] ried on the books of The American Superpower Corporation at $25,632,906.38. When the 344,187 shares of $3 preference stock, 2,210,853 shares of common stock and 1,000,000 option warrants of United Corporation were received by The American Superpower Corporation, said securities were placed on its books at a total of $25,632,-931.37.

On its books of account The American Superpower Corporation apportioned said amount of $25,632,931.37 between said $3 preference stock, common stock, and option warrants of The United Corporation on the basis of the following journal entry:

Securities Account	$5,732,282.20
344,187 The United Corporation $3.00 preferred at $16.65.	
Securities Account	19,546,994.20
2,210,853 The United Corporation common at $8.84138.	
Securities Account	353,654.98
1,000,000 The United Corporation warrants at $.353.	
Securities Account Special	$25,632,931.38
344,187 The United Corporation preferred	
2,210,853 The United Corporation common	
1,000,000 The United Corporation warrants	

To apportion cost of The United Corporation securities received to the different securities on percentages based on values of $47.09 on preferred, $25.00 on common and $1.00 on warrants.

The correct total cost to The American Superpower Corporation of the 800,000 shares of stock of Public Service Corporation of New Jersey and 53,000 shares of stock of United Gas Improvement Company was $25,945,093.88. Said 800,000 shares of common stock of Public Service [fol. 88] Corporation of New Jersey were placed on the books of The United Corporation at $64,000,000 and the 53,000 shares of common stock of United Gas Improvement Company were placed on the books of The United Corporation at $8,480,000, a total for said two blocks of stock of $72,480,000. The other securities acquired by The United Corporation on and prior to January 23, 1929 were placed on its books at the respective values set forth in paragraph 30 of this stipulation.

33. On January 29, 30, and 31, 1929, The American Superpower Corporation sold 9,279 shares out of the aforesaid 2,210,853 shares of common stock of The United Corpora-

tion. The dates of sale, number of shares sold and selling prices were as follows:

Date	Shares	Total selling price	Selling price per share
January 29, 1929	4,964	$282,749.44	$56.96
January 30, 1929	100	6,146.00	61.46
January 30, 1929	10	634.60	63.46
January 30, 1929	50	3,148.00	62.96
January 31, 1929	2,200	136,002.00	61.81
January 31, 1929	280	16,798.80	59.99
January 31, 1929	1,675	100,494.25	59.99
Totals	9,279	$545,973.09	

34. The American Superpower Corporation did not reflect on its books of account any profit or loss in connection with the disposition in January 1929 of its holdings of common stocks of the Public Service Corporation of New Jersey and United Gas Improvement Company and/or the disposition of common stock of the Public Electric Holding Corporation, and the receipt of the aforesaid securities of The United Corporation. In determining the Federal income tax liability of The American Superpower Corporation for the year 1929, the Commissioner of Internal Revenue determined that said transaction or transactions of January 1929 were governed by the provisions of subdivision (b) of Section 112 of the Revenue Act of 1928, and that The American Superpower Corporation derived no taxable gain therefrom.

[fol. 89] The report of a revenue agent, which was approved by the Bureau, treated the matter as involving two separate transactions, viz.: (1) a nontaxable exchange of said common stocks of the Public Service Corporation of New Jersey and the United Gas Improvement Company (plus cash of $25) for 10,000 shares of common stock of The Public Electric Holding Corporation; and (2) a nontaxable exchange of said stock of The Public Electric Holding Corporation for the aforesaid securities of The United Corporation. The Commissioner, applying the provisions of Section 113 of the Revenue Act of 1928, further determined that the basis to The American Superpower Corporation of the common stock, $3 preference stock, and warrants of The United Corporation so received by it was $25,945,118.88, viz., the cost amounting to $25,945,093.88 of the aforesaid stocks of Public Service Corporation of New Jersey and

United Gas Improvement Company, plus the $25 referred to in paragraph 30 of this stipulation. For the purpose of allocating said basis to said three classes of securities of The United Corporation, the Commissioner determined their total fair market value when received to be $72,480,000, and allocated said basis as follows:

	Value Determined by Commissioner	Allocated Basis
2,210,853 shares common stock	$55,271,325.00	$19,785,060.13
344,187 shares $3.00, preference stock	16,208,675.00	5,802,096.56
1,000,000 option warrants	1,000,000.00	357,962.21
Totals	$72,480,000.00	$25,945,118.88

The basis per share of said common stock, as determined by the Commissioner, was therefore $8.94906179, viz., $19,785,060.13 divided by 2,210,853. In connection with determining the deficiency involved in this proceeding, as well as in determining the Federal income tax liability of other stockholders of The American Superpower Corporation, the Commissioner of Internal Revenue determined that when the distributions here in controversy were made The American Superpower Corporation had earnings and profits accumu- [fol. 90] lated after February 28, 1913, equal to or in excess of the respective amounts of such distributions as determined by the Commissioner.

35. In connection with the matters referred to in paragraphs 3 to 7, inclusive, of this stipulation The American Superpower Corporation disposed of 821,472 shares of said 2,210,853 shares of common stock of The United Corporation. In determining the Federal income tax liability of The American Superpower Corporation for the year 1929 the Commissioner determined that said corporation realized a taxable profit therefrom in the amount of $13,185,396.31 computed in the following manner:

Cash received, $25.00 multiplied by 821,472	$20.536,800.00
Less: $8.94906179 multiplied by 821,472	7,351,403.69
	$13,185,396.31

In connection with the matters referred to in paragraphs 10 to 14, inclusive, of this stipulation The American Super-

power Corporation disposed of 410,504 shares out of the aforesaid 2,210,853 shares of common stock of The United Corporation. In determining the Federal income tax liability of The American Superpower Corporation for the year 1929, the Commissioner determined that said corporation realized a taxable profit therefrom in the amount of $8,641,494.34 computed in the following manner:

Amount received, $30.00 multiplied by 410,504	$12,315,120.00
Less: $8.94906179 multiplied by 410,504	3,673,625.66
	$8,641,494.34

36. In connection with the matters referred to in paragraphs 17 to 21 of this stipulation The American Superpower Corporation disposed of 823,748 shares of common stock of The Commonwealth & Southern Corporation. 500,000 of said shares had been acquired by The American Superpower Corporation for cash in the sum of $9,500,000. The remaining 323,748 shares of said stock had been acquired by The American Superpower Corporation in exchange for other securities which had a cost or other basis to The American Superpower Corporation in the amount [fol. 91] of $2,108,297.07. In determining the Federal income tax liability of The American Superpower Corporation for the year 1929 the Commissioner determined that said exchange of securities for common stock of The Commonwealth & Southern Corporation constituted a transaction which did not give rise to taxable gain under the provisions of Sec. 112 (b) of the Revenue Act of 1928 and that the cost or other basis of the 323,748 shares of stock consisted of the cost or other basis to said corporation of the securities exchanged therefor. The total cost or other basis as so determined by the Commissioner for said 823,748 shares was $11,608,297.07. The Commissioner accordingly determined that The American Superpower Corporation realized a taxable profit therefrom in the amount of $747,937.93, computed as follows:

Amount received, $15.00 multiplied by 823,748	$12,356,235.00
Less: Basis determined as above	11,808,297.07
	747,937.93

37. From the date of its incorporation in 1923 to the close of business on December 31, 1928, The American Superpower Corporation had earnings and profits in the amount of $18,540,706.68. During the same period said corporation paid to its stockholders cash dividends in the amount of $7,542,160.50. During the same period said corporation declared and issued to its stockholders stock dividends in the amount (par or stated value) of $2,541,577.70, which amount was charged by the corporation against its earned surplus per books.

38. During the period from January 1, 1929, to and including July 2, 1929, The American Superpower Corporation paid cash dividends to its stockholders as follows:

January 2, 1929	$880,488.00
April 1, 1929	1,000,564.50
July 1, 1929	1,000,596.00

39. If it be held that, notwithstanding the provisions of subdivision (b) of Sec. 112 of the Revenue Act of 1928, the transaction or transactions of January, 1929, wherein The American Superpower Corporation disposed of its holdings of common stock of the Public Service Corporation of New [fol. 92] Jersey and The United Gas Improvement Company, and/or its holdings of common stock of The Public Electric Holding Corporation, and received securities of The United Corporation, and the transactions of May or June, 1929, wherein The American Superpower Corporation disposed of certain securities in exchange for stock and warrants of The Commonwealth & Southern Corporation, resulted in the realization of "earnings or profits", within the meaning of that expression as contained in Sec. 115 (a) of the Revenue Act of 1928; then it is agreed that the respective securities received in exchange had a fair market value which was at least sufficient so that, at all times during the period from January 1, 1929, to and including July 2, 1929, the earnings and profits of The American Superpower Corporation were equal to or in excess of the cash dividends paid during said period plus the market value, as determined in this proceeding, of the rights and/or interests in property acquired by the common stockholders of The American Superpower Corporation pursuant to and as the result of the director's resolutions of January 23, 1929, May 1, 1929, and June 5, 1929.

40. Excluding from consideration the following items or transactions:

(a) The profit, if any, realized by The American Superpower Corporation from the transaction or transactions of January, 1929, wherein said corporation disposed of 800,000 shares of common stock of the Public Service Corporation of New Jersey and 53,000 shares of common stock of United Gas Improvement Company and/or its holdings of common stock of The Public Electric Holding Corporation, and received the aforesaid securities of The United Corporation;

(b) The profit, if any, realized by The American Superpower Corporation in connection with the transaction or transactions of May or June, 1929, wherein said corporation disposed of certain securities in exchange for common stock and warrants of The Commonwealth and Southern Corporation;

(c) The profit, if any, realized by The American Superpower Corporation in connection with the disposition of common stock of The United Corporation pursuant to the provisions of the directors' resolution of January 23, 1929;

[fol. 93] (d) The profit, if any, realized by The American Superpower Corporation in connection with the disposition of common stock of The United Corporation pursuant to the directors' resolution of May 1, 1929;

(e) The profit, if any, realized by The American Superpower Corporation in connection with the disposition of common stock of The Commonwealth & Southern Corporation pursuant to the provisions of the directors' resolution of June 5, 1929;

(f) The profits realized on the sales referred to in Paragraph 33; and

(g) The liability of The American Superpower Corporation for Federal income taxes for the calendar year 1929;

the following tabulation is a correct statement in respect of the remainder of the net earnings and profits of The American Superpower Corporation for the period January 1, 1929, to and including July 2, 1929:

Periods (including last date of each period)	Dividends from Domestic Corporation	Profits or Losses on Sale of Securities	Other Net Earnings Subject to Income Tax	Total
Jan. 1 to Jan. 26	$219,587.87		($35,320.01)	$184,267.86
Jan. 27 to Jan. 30	33,782.75	$464,779.90		498,562.65
January 31	8,445.69		(3,095.56	5,350.13
February 1	9,048.06		(10,400.78	(1,352.72)
Feb. 2 to Feb. 15	126,672.84	1,740,386.86	(70,925.55)	1,796,134.15
Feb. 16 to Apr. 1	586,487.22	(1,566.07)	112,390.11	697,311.26
April 2 to May 8	381,075.06	652.10	60,528.00	442,255.16
May 9 to May 10	9,073.11	11.04	(2,263.28	6,820.87
May 11 to May 12	9,073.11		(2,263.28	6,809.83
May 13	4,536.56		(1,131.64	3,404.92
May 14 to May 24	49,902.09	162,314.00	(37,832.51)	174,383.58
May 25 to June 18	90,620.87	77,860.61	20,350.96	188,832.44
June 19 to June 22	13,081.11		307.81	13,388.92
June 23	3,270.28			3,270.28
June 24	3,270.28	37,216.50		40,486.78
June 25 to June 27	9,810.83	828,257.11	(112.11	837,955.83
June 28 to July 1	15,898.98		81,113.96	97,012.94
July 2	6,088.15		(32,969.24)	(26,881.09)
	$1,579,724.86	$3,309,912.05	$78,376.88	$4,968,013.79

[fol. 94] (NOTE.—In the above tabulation the use of parentheses denotes minus quantities. All items in this tabulation, except those in the column headed "Dividends from Domestic Corporations", are as shown by the books of account of The American Superpower Corporation. Dividends from domestic corporations, as set forth in the column so designated, were entered on the books of account of The American Superpower Corporation on the basis of monthly accruals, that is, at the end of each month during the year 1929 all such dividends then accrued but unpaid were entered as dividends receivable and credited to profit and loss. In this tabulation the total dividends so determined for each month are pro-rated on the basis of the number of days in that month. For example, the figure of $219,587.87 represents 26/31sts of the dividends accrued for the month of January, 1929.)

41. The amount of the Federal income tax liability of The American Superpower Corporation for the calendar year 1929, as determined by the Commissioner of Internal Revenue and paid by said corporation subsequent to the year 1929 was $5,235,285.25, which was imposed upon the following items of income:

The profits referred to in Paragraph 35, viz., $13,185,396.31 and $8,641,494.34	$21,826,890.65
The profits referred to in Paragraph 36	747,937.93

The profits on the sales referred to in Paragraph 33:

Date of Sale	Shares	Basis per Share	Total Basis	Selling Price	Profit	
1/29/29	4,964	$8.94906179	$44,423.14	$282,749.44	$238,326.30	
1/30/29	100	8.94906179	894.91	6,146.00	5,251.09	
1/30/29	10	8.94906179	89.49	634.60	545.11	
1/30/29	50	8.94906179	447.45	5,148.00	2,700.55	
1/31/29	2,200	8.94906179	19,687.94	136,002.00	116,314.06	
1/31/29	280	8.94906179	2,505.74	16,798.80	14,293.06	
1/31/29	1,675	8.94906179	14,989.68	100,494.25	85,504.57	
Total						462,934.74
Other profits on sales of securities made in the period from January 1, 1929 and including July 2, 1929, as set forth in Paragraph 40						3,309,912.05
Other net earnings subject to income tax for the period from January 1, 1929 to July 2, 1929 as set out in Paragraph 40						78,376.88
Subtotal						$26,426,052.25
Net earnings and profits subject to income tax for the period from July 3, 1929, to December 31, 1929						21,167,450.06
Total						$47,593,502.31

[fol. 95] On or about June 11, 1929, the Utility Shares, Inc., (a Delaware corporation) merged with The American Superpower Corporation. At the time of said merger the earnings and profits accumulated after February 28, 1913, of the Utility Shares, Inc., as shown by entries on the books of The American Superpower Corporation, were $1,001,050.60.

42. On or about September 13, 1929, and within two years from the date of the earliest acquisition by petitioner of stock in The American Superpower Corporation, petitioner sold 100 shares of common stock of The American Superpower Corporation. The selling price received by petitioner was $6,116. In determining the deficiency for 1929 the Commissioner included in ordinary income a profit from the disposition of said 100 shares of stock in the amount of $5,565 determined upon a cost or other basis to the petitioner in the amount of $551 or $5.51 per share. In the event it be determined and held:

(1) That the transactions in respect of the right to acquire and the acquisition of common stock of The United Corporation and The Commonwealth & Southern Corporation as evidenced by and consummated pursuant to the directors' resolutions of January 23, May 1, and June 5, 1929, constituted distributions made by The American Superpower Corporation to its shareholders, but that when such distributions, or any of them, were made The American Superpower Corporation did not have sufficient accumulated earnings or profits to equal the amount thereof; or

(2) That such distributions to petitioner and other stockholders of The American Superpower Corporation of such rights to acquire common stock of The United Corporation, or the acquisition of such stock, pursuant to said directors' resolutions of January 23, and May 1, 1929, were nontaxable because of the provisions of subdivision (g) of Section 112 of the Revenue Act of 1928;

then in either or both of said events a further adjustment of the taxable profit on petitioner's disposition of said 100 [fol. 96] shares of common stock of The American Superpower Corporation would be required by applying the provisions of Section 115 (d) and/or Section 113(a) (9) of the Revenue Act of 1928. Subject to the approval of the Board,

the parties agree that such resulting adjustment may be made under Rule 50 of the Board's Rules of Practice.

The common stock of The American Superpower Corporation was dealt in on the New York Curb Exchange. The following tabulation discloses the market prices of such stock, as reflected by sales on the New York Curb Exchange, on the respective dates as indicated:

Date 1929		Class A Common Stock Number of Shares Sold	High	Low	Class B Common Stock Number of Shares Sold	High	Low
January	23	27,600	108 7/8	103 1/4	4,000	111	108
	24	21,500	108 3/8	104 1/2	4,200	110	106
	25	32,200	113 3/4	105 1/4	3,000	117 7/8	107 3/4
	26	14,500	118	112	2,000	125	119
	28	20,500	120	116 1/8	3,500	126	123 1/8
	29	10,100	118 7/8	114	1,100	124 5/8	120
	30	21,500	134 1/2	118 1/8	3,000	133	120 1/4
February	1	10,900	129 3/4	124	1,100	131	129
	2	3,000	127 7/8	123 1/2	—	—	—
	4	8,800	125 3/4	122	1,100	127 1/8	122
	5	3,500	107 1/2	101	500	111 3/4	105
	6	7,500	105 1/2	96	1,400	105 1/8	102
	7	4,600	92	82 1/4	300	96	96
	8	8,200	98	94 1/8	2,100	101	92
	11	10,200	102 1/4	93 3/8	600	103 3/4	96 1/8
	13	6,700	106	100	1,200	106	103 1/4
	14	3,900	101	98 1/4	100	102	102
	15	5,700	101 5/8	90 1/8	1,800	101 1/2	96
May	1	30,100	134 7/8	122 1/8	5,900	135	128
	2	33,900	142	134	2,300	141 3/8	135
	3	9,600	137	133	3,200	138 3/8	131
	4	10,800	146 3/4	137 5/8	2,000	146	138 1/2
	6	36,900	165	149 1/4	5,900	165 7/8	153
	7	19,600	164	156 3/8	1,800	163 7/8	158
[fol. 97]							
	8	19,800	150	143	3,400	149	143
	9	16,000	154 3/4	148 1/8	2,700	154 7/8	148 1/2
	10	14,100	166 1/4	153	6,800	165	163
	11	5,200	169 7/8	164 1/4	1,600	169 3/4	165
	13	11,800	166	153	3,200	164	152
	15	7,700	163	158 1/2	700	162 1/4	161 7/8
	16	4,000	164	156	1,400	162	157
	17	6,000	164	158 5/8	1,300	164 1/2	158 1/2
	18	2,900	161	159 1/4	200	161	161
	20	4,100	159 1/2	151 7/8	100	160 1/2	160 1/2
	21	6,400	154 3/4	149 1/2	3,200	153	149
	22	6,800	153 1/4	145 5/8	1,800	153 1/2	145 1/2
	23	4,500	154 7/8	146 3/4	700	151 1/4	146
	24	9,500	165	160 1/8	5,000	165 3/4	160

New Common Stock

Date		Number of Shares	High	Low
June	5	266,500	44¼	40¼
	6	83,500	42½	40¾
	8	21,300	40⅞	39⅝
	10	79,500	41	38⅜
	11	57,800	41½	39⅛
	12	79,900	41¼	39⅝
	13	36,800	41	39¾
	14	50,000	41⅞	40¾
	15	16,100	42	41½
	17	56,300	44¼	42
	18	54,700	43¾	42⅛
	19	41,300	42⅞	41½
	20	27,600	42¾	41⅝
	21	142,400	47⅜	42⅛
	22	70,800	49	46½
	24	78,400	49⅝	47½
	25	55,500	48½	46¾
	26	96,600	52¼	47¾
	27	127,100	55¾	51
[fol. 98]				
	28	114,000	55½	53⅜
	29	72,800	57⅞	55⅜
July	1	95,500	59	55⅝
	2	59,800	57⅛	55½

As of January 1, 1929, petitioner's holdings of stock of The American Superpower Corporation consisted of the following lots with allocated costs or other bases as indicated:

Lot No.	Description and Manner of Acquisition	Number of Shares	Allocated Total Cost as of 1/1/29	Allocated Cost Per Share
	Class B Stock:			
1	On September 22, 1927 by purchase	2,500	$60,552.22	$24.2208
2	On May 21, 1928 by purchase	100	4,456.81	44.5681
	Subtotals	2,600	$65,009.03	
	Class A Stock:			
3	On September 22, 1927 by purchase	1,508	$36,887.71	$24.4613
4	On December 31, 1927 as stock dividend on Lot 1	52	1,285.21	24.7155
	On March 3, 1928 through the exercise of stock rights:			
5	Received on Lot 3	663	16,659.67	25.1277
6	Received on Lot 4	13	327.12	25.1631
7	Received on Lot 1	650	16,366.11	25.1786

Lot No.	Description and Manner of Acquisition	Number of Shares	Allocated Total Cost as of 1/1/29	Allocated Cost Per Share
	On December 31, 1928 through the exercise of stock rights:			
8	Received on Lot 3.....	217.5	9,912.93	45.5766
9	Received on Lot 4.....	7.5	342.06	45.6080
10	Received on Lot 5.....	95.5	4,360.97	45.6646
11	Received on Lot 6.....	1.75	80.30	45.8857
12	Received on Lot 7.....	93.75	4,281.28	45.6669
13	Received on Lot 1.....	375	16,980.79	45.2821
14	Received on Lot 2.....	15	714.28	47.6186
[fol. 99]				
	On December 31, 1928 as stock dividends:			
15	On Lot 1.....	100	2,125.13	21.2513
16	On Lot 2.....	4	156.41	39.1025
	Subtotals.....	3,796	$110,479.97	
	Totals.....	6,396	$175,489.00	

On June 10, 1929, petitioner acquired by purchase four additional shares (Lot 17) of Class A common stock at a cost of $853.50, or $213.375 per share.

43. In addition to the shares of common stock of The United Corporation mentioned in paragraphs 6 and 13 of this stipulation, petitioner purchased during 1929, two shares of such common stock at a cost of $95.50, and one share at a cost of $68.25, so that petitioner then became the owner of 4,800 shares of common stock of The United Corporation. On or about July 10, 1929, The United Corporation issued to the holders of its common stock rights to subscribe to additional common stock of The United Corporation, petitioner receiving 4,800 rights. During the year 1929 petitioner exercised 1,000 of said rights and subscribed for and acquired 200 additional shares of The United Corporation common stock. Prior thereto, on or about August 3-5, 1929, petitioner sold 3,800 of said rights for a total price of $23,397.80. In his return for the year 1929 the petitioner used a cost or other basis of $6,764 as applicable to said rights and reported as ordinary income a profit in the amount of $16,633.80. In determining the deficiency the Commissioner increased the cost or other basis to the petitioner of said 3,800 United Corporation rights to the sum of $14,866.10 and included as ordinary income a cor-

rected profit of $8,531.70. The revised cost or other basis of $14,866.10 was computed by the Commissioner as follows:

Basis of Common Stock of The United Corporation

Lot One

Shares acquired pursuant to resolution of January 23, 1929:

[fol. 100]

	Shares	Basis
Exercised 6,396 rights @ $12.50, value determined by Commissioner	3,198	$79,950.00
Cash, 1 for 2 @ $25.00		79,950.00
Shares acquired by purchase	2	95.50
	3,200	$159,995.50

Lot Two

Shares acquired pursuant to resolution of May 1, 1929:

Exercised 6,396 rights @ $8.625, value determined by Commissioner	1,599	$35,165.50
Cash, 1 for 4 @ $30.00		47,970.00
Share acquired by purchase	1	68.25
	1,600	$103,203.75

Basis allocated to 3,800 Rights:

3,200 rights (Lot One) 7.4818% of $159,995.50	$11,970.54
600 rights (Part Lot Two) 7.4818% of $103,203.75 x 600/1600	2,895.56
Total basis as above	$14,866.10

In the event it be determined and held:

(1) That the acquisition by petitioner and other stockholders of The American Superpower Corporation of rights to acquire common stock of The United Corporation pursuant to the directors' resolutions of January 23, and May 1, 1929, or the acquisition of such stock, did not constitute distributions made by said corporation to its shareholders; or

(2) That the acquisition of such rights and/or the common stock of The United Corporation represented nontaxable distributions within the provisions of Section 112 (g) of the Revenue Act of 1928; or

(3) That the respective fair market values of the rights (for the purpose of measuring the amount of such distri-

butions received by the petitioner) were different than the values determined by the Commissioner;

then a further adjustment of the taxable profit on petition-[fol. 101] er's disposition of said 3,800 rights of The United Corporation would be required. Subject to the approval of the Board the parties agree that such resulting adjustment may be made under Rule 50 of the Board's Rules of Practice. The parties further agree that the correct basis to the petitioner applicable to said 3,800 rights of The United Corporation is 7.4818 percent of whatever sum may be the correct cost or other basis to the petitioner of the respective shares of common stock of The United Corporation on which such rights were issued.

44. The parties hereto have agreed to the facts herein set forth solely for the purposes of this proceeding for the calendar year 1929, and this stipulation is without prejudice to any other proceeding.

A. Mitchell Palmer, Counsel for Petitioner. Robert H. Jackson, R. G. W., General Counsel, Bureau of Internal Revenue, Counsel for Respondent.

EXHIBIT "B" TO STIPULATION

New York, January 8, 1929.

The United Corporation, Wilmington, Del.

GENTLEMEN:

As a part of a plan of reorganization you have been incorporated with an authorized capital consisting of 1,000,000 shares of first preferred stock, 2,000,000 shares of preference stock, and 10,000,000 shares of common stock, none of which is issued, outstanding, or subscribed for except 10 shares of common stock subscribed for by the original incorporators.

We also understand that, in accordance with the terms of your charter, you have created or are about to create a form of option warrant, entitling the holder thereof to purchase at any time, without limit, shares of common stock of your corporation, as such stock may be constituted at the time of such purchase, at a price of $27.50 per share,

subject to the terms and conditions stated therein, which form of option warrant we have examined.

[fol. 102] In accordance with said plan of reorganization we offer to transfer, or cause to be transferred to you, the following:

1. 130,565 shares of the capital stock of the United Gas Improvement Co.

2. 69,500 shares of the common stock of Public Service Corporation of New Jersey.

3. 62,360 shares of the second preferred stock of Mohawk Hudson Power Corporation.

4. 359,957 shares of the common stock of Mohawk Hudson Power Corporation.

5. 124,740 option warrants of Mohawk Hudson Power Corporation, each of such option warrants authorizing the holder thereof to purchase at any time 1 share of common stock of that company at $50 per share.

6. Cash in the sum of $323,655.

In consideration thereof, you agree to issue to us, or to our nominee, 600,000 shares of your $3 cumulative preference stock, 800,000 shares of your common stock, and option warrants, in the form you have created, entitling holders thereof to purchase at any time, without limit, 714,200 shares of your common stock at a price of $27.50 per share. The original incorporators have assigned to us their subscription rights to 10 shares of common stock of your corporation, which shares are included in the above-mentioned shares.

We agree to pay you said cash and to deliver, or cause to be delivered and transferred to you, said securities on the 14th day of January, 1929, at which time you agree to issue and deliver to us, or our nominees, temporary certificates for the $3 cumulative preference stock and the common stock, and the option warrants, as above provided.

We understand that, of the consideration to be received by you for the sale of the aforementioned $3 cumulative preference stock, common stock, and option warrants, $50 shall constitute the consideration received for the sale of each share of $3 cumulative preference stock, $1 shall constitute the consideration received for the sale of each right represented by the above-mentioned option warrants to pur-

chase 1 share of the common stock at $27.50 per share, and [fol. 103] the balance of the consideration shall be received for the sale of the above-mentioned common stock, and that, of the consideration received for the sale of the $3 cumulative preference stock, you will capitalize the entire consideration, i. e., $50 per share, and that, of the consideration received for the sale of your common stock, you will capitalize $5 per share and that you will credit the balance of the consideration received for the common stock and the consideration received for the option warrants to surplus.

Upon your acceptance hereof, as provided below, this letter will constitute a contract between us.

Yours very truly, J. P. Morgan & Co.

Accepted, January 8, 1929.

The United Corporation, by George Roberts, President. (Seal.)

EXHIBIT "C" TO STIPULATION

New York, January 9, 1929.

The United Corporation, Wilmington, Delaware.

DEAR SIRS:

We understand that you have been incorporated with an authorized capital consisting of 1,000,000 shares of first preferred stock, 2,000,000 shares of preference stock, and 10,000,000 shares of common stock. We further understand that, of this authorized stock, you have agreed to issue the amount shown by a contract between yourselves and Messrs. J. P. Morgan & Co., a copy of which is annexed hereto marked "Exhibit A".

We hereby offer, on behalf of ourselves and our associates, to purchase from you 400,000 shares of your common stock and option warrants entitling the holders thereof to purchase 1,000,000 shares of common stock, and to pay you for such purchase the sum of $10,000,000. We understand that Bonbright Electric Corporation has likewise offered to pay to you a sum of $10,000,000 against the issuance and delivery by you of the same amount of securities.

We agree to make payment to you for the above shares of common stock and option warrants on the 15th day of

[fol. 104] January, 1929, at which time you agree to issue and deliver to us, or our nominees, temporary certificates for the common stock and option warrants, which are the subject of this purchase.

We understand that, of the consideration to be received by you from us in payment of said common stock and option warrants, $22.50 shall constitute the consideration received from the sale of each share of common stock and $1 shall constitute the consideration received from the sale of each right represented by said option warrants to purchase one share of common stock at $27.50 per share; and that, of the consideration received for the sale of your common stock, you will capitalize $5 per share and that you will credit the balance of the consideration received for the common stock and the consideration received for the option warrants to surplus.

Upon your acceptance hereof, as provided below, this letter will constitute a contract between us.

Very truly yours, J. P. Morgan & Co.

EXHIBIT "D" TO STIPULATION

New York, January 9, 1929.

The United Corporation, Wilmington, Del.

DEAR SIRS:

Referring to the contract between us, as evidenced by letter dated January 8, 1929, we hereby confirm that the number of shares of Mohawk Hudson Power Corporation common to be delivered by us is 358,957 instead of 359,957.

We will make a delivery and transfer to you of the securities covered by such contract on Thursday, January 10, instead of Monday, January 14, 1929, and the amount of cash payable by us will be adjusted so that we will pay you the sum of $371,025.76, instead of the sum of $323,655.

We also confirm that under our contract with you, dated January 8, 1929, we will make payment to you of the $10,000,000 which we have contracted to pay for 400,000 shares of your common stock and your option warrants for 1,000,000 shares of common stock, and you will make delivery of the same on January 11, 1929, instead of January 15.

[fol. 105] Kindly confirm the above understanding.

Yours very truly, J. P. Morgan & Co.

Above understanding is hereby confirmed, dated January 9, 1929.

The United Corporation, by L. K. Thorne.

Signed as accepted.

L. K. Thorne, of Bonbright & Company, Inc.

EXHIBIT "E" TO STIPULATION

The Public Electric Holding Corporation, Dover, Delaware.

GENTLEMEN:

We understand that you are incorporated under the laws of the State of Delaware with an authorized Capital Stock of 10,000 shares, all of the par value of $100. each, all of which shares are of the same class. We further understand that none of said shares are outstanding, but that 10 shares have been subscribed for by the incorporators of your corporation. Against the delivery to A. P. Taliaferro of certificates for 10,000 shares of Capital Stock (including the 10 shares subscribed for by the incorporators who have assigned their subscription to us) in the name of A. P. Taliaferro or his nominee, being your entire authorized Capital Stock, we offer to deliver to you in payment therefor 800,000 shares of Common Stock of Public Service Corporation of New Jersey and 53,000 shares of the Common Stock of The United Gas Improvement Company, together with cash in the amount of $25.

Upon your acceptance thereof, as provided below, this letter will constitute a contract between us.

Very truly yours, The American Superpower Corporation, by Hamilton Hadley, Vice President.

Accepted January 11, 1929.

The Public Electric Holding Corporation, by Sherman Ewing, Vice President.

[fol. 106] EXHIBIT "F" TO STIPULATION

Whereas, the American Superpower Corporation agreed to transfer to The Public Electric Holding Corporation eight hundred thousand (800,000) shares of the Common

Stock of Public Service Corporation of New Jersey and fifty-three thousand (53,000) shares of Common Stock of The United Gas Improvement Company by Agreement dated January 11th, 1929, upon the terms and conditions therein set forth.

Now, therefore, in consideration of the premises and pursuant to said Agreement, The American Superpower Corporation does hereby sell, assign, transfer and set over unto The Public Electric Holding Corporation all right, title and interest which The American Superpower Corporation has in or to said eight hundred thousand (800,000) shares of Common Stock of Public Service Corporation of New Jersey, and fifty-three thousand (53,000) shares of the Common stock of United Gas Improvement Company.

The American Superpower Corporation does further agree that whenever and as often as requested by The Public Electric Holding Corporation, its successors or assigns, that it will execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered any and all such other and further assignments or transfers, powers of attorney, or other instruments as The Public Electric Holding Corporation, its successors and assigns may deem necessary or proper to perfect the sale, assignment and transfer herein contained.

In witness whereof, the American Superpower Corporation has caused this instrument to be executed by its proper and duly authorized officer, this 11th day of January, 1929.

The American Superpower Corporation, by Hamilton Hadley, Vice-President.

STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, that on the 11th day of January, 1929, before me Kenneth D. McLaren, personally appeared Hamilton Hadley, to me known, who being by me duly sworn, according to law, on his oath, doth depose and make proof [fol. 107] to my satisfaction that he is the Vice-President of The American Superpower Corporation, the corporation described in and which executed the foregoing instrument; that he well knows the seal of said corporation; that the seal affixed to the said instrument is the corporate seal of the said corporation; that it was so affixed in pursuance of authority of the Board of Directors; that he, Hamilton

Hadley, is the Vice-President of the said corporation, that he signed, sealed and delivered said instrument as the voluntary act and deed of the said corporation in pursuance of authority expressly vested in him by the Board of Directors.

Subscribed and sworn to before me, at Jersey City the day and year aforesaid. Kenneth D. McLaren, Notary Public, N. J.

EXHIBIT "G" TO STIPULATION

Number 1. 10,000 Shares.

Incorporated Under the Laws of Delaware

The Public Electric Holding Corporation

Capital Stock, $1,000,000. Shares, $100 Each

This is to Certify that A. P. Taliaferro is the owner of ten thousand Shares of the Capital Stock of The Public Electric Holding Corporation transferable on the books of the Corporation by the holder hereof in person or by duly authorized Attorney upon surrender of this Certificate properly endorsed.

Witness the seal of the Corporation and the signatures of its duly authorized officers affixed this eleventh day of January 1929.

G. Herbert Semler, President. Hayden N. Smith, Secretary. (Seal.)

Full Paid and Non-Assessable.
Photostat Copy.

[On back:]

For value Received, — hereby sell, assign and transfer into —— ——, — Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably consti-
[fol. 108] tute and appoint —— —— Attorney to transfer the said stock on the Books of the within named Corporation with full power of substitution in the premises.

A. P. Taliaferro.

Dated —— —, 19—.
In Presence of C. J. Wagner.

Notice: The Signature to this assignment must correspond with the name as written upon the face of the Certificate, in every particular, without alteration or enlargement or any change whatever.

EXHIBIT "H" TO STIPULATION

January 12th, 1929.

Messrs. Charles Day, John E. Zimmerman, % Drexel & Co., Philadelphia, Pa.

GENTLEMEN:

The undersigned has been organized under the laws of the State of Delaware with an authorized capital stock of Thirteen Million (13,000,000) shares all without nominal or par value, of which One Million (1,000,000) shares are to be First Preferred Stock, Two Million (2,000,000) shares are to be Preference Stock and Ten Million (10,000,000) shares are to be Common Stock. The provisions of its Charter are contained in an Agreement of Merger and Consolidation, of which we enclose a copy.

The United Corporation has created a $3 Series of Preference Stock, designated as $3 Cumulative Preference Stock. This stock has a dividend rate of Three ($3) Dollars per share, is redeemable at a price of Fifty-five ($55) Dollars per share plus accrued dividends, has a liquidation price of Fifty ($50) Dollars per share plus accrued dividends and has dividends payable, if declared, on the first days of January, April, July and October.

In accordance with the terms of its Charter, the undersigned created a form of Option Warrant entitling the holder thereof to purchase at any time, without limit, shares of Common Stock of this Corporation, as such may be constituted at the time of such purchase, at a price of Twenty-seven and 50/100 ($27.50) Dollars per share, subject to the further terms and conditions therein stated. You will find enclosed herewith a specimen form of the Option Warrant.

[fol. 109] Stock and Option Warrants, as described above, have been or are about to be issued to J. P. Morgan & Co., The American Superpower Corporation and Bonbright

Electric Corporation, or their nominees, in the aggregate amount of:

(a) Nine Hundred Forty-four Thousand, One Hundred Eighty-seven (944,187) shares of $3 Cumulative Preference Stock of The United Corporation.

(b) Three Million, Eight Hundred Ten Thousand, Eight Hundred Fifty-three (3,810,853) shares of Common Stock of The United Corporation.

(c) Option Warrants, in the form above described, entitling the holders thereof to purchase at any time, without limit, an aggregate of Three Million, Seven Hundred Fourteen Thousand, Two Hundred (3,714,200) shares of Common Stock of The United Corporation at Twenty-seven and 50/100 ($27.50) Dollars per share.

Upon completion of the consolidation, this Corporation will have assets consisting of the following:

1.–Cash in the sum of $20,371,050.76.
2.–183,565 shares of the Capital Stock of The United Gas Improvement Company.
3.–859,500 shares of the Common Stock of Public Service Corporation of New Jersey.
4.– 62,300 shares of the Second Preferred Stock of Mohawk Hudson Power Corporation.
5.–358,957 shares of the Common Stock of Mohawk Hudson Power Corporation.
6.–124,740 Option Warrants of Mohawk Hudson Power Corporation, each of such Option Warrants authorizing the holders thereof to purchase at any time one share of Common Stock of that Company at $50 per share.

We hereby confirm our agreement to sell and deliver to you or your associates:

(a) Twenty-four Thousand, Three Hundred Twenty [fol. 110] (24,320) shares of the $3 Cumulative Preference Stock of The United Corporation.

(b) One Hundred Fifty-Six Thousand, One Hundred Sixty (156,160) shares of the Common Stock of The United Corporation.

(c) Option Warrants entitling the holders thereof to purchase Seventy Thousand, Six Hundred Fifty-six (70,656) shares of the Common Stock of The United Corporation.

In consideration and payment of the issuance to you of the above mentioned shares of stock, which shall be full paid and non-assessable, you have agreed, on behalf of yourself and your associates, to deliver to us Thirty-two Thousand (32,000) shares of the Capital Stock of The United Gas Improvement Company.

We understand that you will make delivery of the above mentioned securities to us on or before the 21st day of January, 1929, at which time we will deliver to you temporary certificates for the stock and the Option Warrants to which you will become entitled by the terms of this contract.

We have contracted with a few others for the purchase of additional shares of the Common Stock of Public Service Corporation of New Jersey and Capital Stock of The United Gas Improvement Company upon the same terms as those contained herein to you, subject only to fractional readjustments, and the capitalization of this Corporation and its assets will be altered accordingly when the terms of these contracts have been carried out.

Of the consideration which we have received and are about to receive for the issuance of our capital stock and Option Warrants, we have determined that Fifty ($50) Dollars shall constitute the consideration for the issuance of each share of $3 Cumulative Preference Stock, One ($1) Dollar shall constitute the consideration for the issuance of each right represented by the above mentioned Option Warrants to purchase one (1) share of Common Stock and the balance shall constitute the consideration received for the issuance of the Common Stock. We have further determined that, of the consideration received for the issuance of $3 Cumulative Preference Stock, the entire consideration be capital and that, of the consideration received for [fol. 111] the issuance of Common Stock, Five ($5) Dollars be capital and the balance of the consideration received for the Common Stock and the entire consideration received for the Option Warrants be credited to paid-in surplus of the Corporation.

If this letter correctly states the terms of our contract, will you kindly indicate the same by signing the acceptance attached hereto.

Very truly yours, The United Corporation, by George Roberts, Vice-President.

Accepted, January —, 1929.

Charles Day. John E. Zimmerman.

PETITIONER'S EXHIBIT "I" TO STIPULATION

Admitted in Evidence April 4, 1934

Certified Copy

Agreement of Merger and Consolidation Between the United Corporation and The Public Electric Holding Corporation Continuing The United Corporation Dated January 11th, 1929

Agreement dated the 11th day of January, 1929, between The United Corporation and a majority of the Directors thereof, parties of the first part, and The Public Electric Holding Corporation and a majority of the Directors thereof, parties of the second part (said corporations being sometimes hereinafter referred to collectively as the Constituent Corporations).

Whereas, the Constituent Corporations are corporations duly organized and existing under the laws of the State of Delaware, and

Whereas, a majority of the Directors of the respective Constituent Corporations deem it advantageous for the respective Corporations and to the benefit of their Stockholders to merge and consolidate The Public Electric Holding Corporation into The United Corporation pursuant to the provisions of the General Corporation Law of the State of Delaware.

Now therefore, this Agreement witnesseth:

[fol. 112] It is hereby agreed by and between the parties hereto acting in pursuance of the General Corporation Law of the State of Delaware, that The Public Electric Holding

Corporation shall be merged and consolidated into The United Corporation, and the parties hereto by these presents agree to and prescribe the following terms and conditions of such merger and consolidation, and the mode of carrying the same into effect.

First. The name of the Corporation into which The Public Electric Holding Corporation is merged and consolidated, is The United Corporation (hereinafter sometimes called the Corporation).

Second. The location of its principal office in the State of Delaware is No. 7 West Tenth Street, in the City of Wilmington, County of New Castle. The name of the agent therein and in charge thereof is the Corporation Trust Company of America of No. 7 West Tenth Street, Wilmington, Delaware.

Third. The nature of the business of the Corporation or objects or purposes proposed to be transacted, promoted or carried on by it are:

1. To acquire and hold the securities of electric power and light and gas companies and other public utility companies and companies owning the stocks or securities of public utility companies.

2. To acquire and hold the securities of companies engaged in the business of managing or operating, or supervising the management or operation of public utility companies, and of companies doing a general construction, engineering or contracting business with public utility and other companies.

3. To invest and deal with the monies of the Corporation in any manner, and to acquire by purchase, by the exchange of stock or other securities of the Corporation, by subscription or otherwise and to invest in, to hold for investment or for any other purpose and to deal in and to use, sell, pledge or otherwise dispose of any stocks, bonds, notes, debentures and other securities and obligations of any Government, State, municipality or corporation or association or partnership, domestic or foreign (including without prejudice to the generality of the foregoing the companies described in paragraphs 1 and 2 above), and while owner of any such [fol. 113] stocks, bonds, notes, debentures or other securi-

ties or obligations, to exercise all the rights, powers and privileges of ownership, including among other things the right to vote thereon for any and all purposes.

4. Either directly or through subsidiary companies to engage in the business of managing, operating and/or supervising the management or operation of public utility companies.

5. Either directly or through subsidiary companies to do a general construction and engineering business with public utility and other companies.

6. To act as financial or business or purchasing agent, general or special.

7. To aid in any lawful manner by loan, subsidy, guaranty or otherwise, any company whose stock, bonds, notes, debentures or other securities or obligations are held or controlled directly or indirectly by the Corporation, and to do any and all lawful acts or things necessary or advisable to protect, preserve, improve or enhance the value of any such stocks, bonds, notes, debentures or other securities or obligations.

8. To guarantee and to assume the payment of any dividends on any shares of the capital stock of any company in which the Corporation may either directly or indirectly have an interest as stockholder or otherwise, and to assume and to guarantee by endorsement or otherwise the payment of the principal of and the interest on bonds, notes or other obligations created or to be created by any such company.

9. To acquire, to develop, to improve, to sell, to assign, to transfer, to convey, to lease, to sublease, to pledge and to otherwise alienate and dispose of and to mortgage or otherwise encumber real property situate in any part of the world and the fixtures and personal property incident thereto or connected therewith.

10. To develop and turn to account any land owned by the Corporation or in which it has an interest directly or indirectly, and among other things, to lay out and prepare the same for building purposes and to construct, alter and equip buildings and let the same by lease or agreement or otherwise and to advance money to and enter into contracts

[fol. 114] and arrangements of all kinds with builders, contractors, tenants and others.

11. To purchase, to sell, to manufacture and generally to deal in building materials and goods, wares and merchandise and to carry on any other lawful trade or business incidental to or proper or useful in connection with the purchase, sale, ownership, construction and equipment of its property.

12. To acquire, to hold, to own, to make, to dispose of and generally to deal in grants, concessions, franchises, rights of way and contracts of every kind from or with any person, firm, association, corporation, private, public or municipal, or body politic, and from or with the government or public authorities of the United States, or of any State, territory, possession or dependency thereof, or from or with the District of Columbia, or from or with any foreign government; to cause to be formed, to promote and to aid in any way in the formation of any corporation or association, domestic or foreign.

13. To make and enter into all manner and kinds of contracts, agreements and obligations for the purchasing, acquiring, holding, using, dealing in, selling or otherwise disposing of any and all kinds of property, real and personal.

14. To borrow money, to issue bonds, debentures, notes or other obligations secured or unsecured of the Corporation; to secure the same by mortgage or mortgages or deed or deeds of trust or pledge or other lien upon any or all of the property, rights, privileges and franchises of the Corporation wheresoever situate, acquired or to be acquired; to confer upon the holders of any debentures, bonds, notes or other obligations of the Corporation secured or unsecured the right to convert the same into any class of stock of any series of the Corporation now or hereafter to be issued upon such terms as shall be fixed by the Board of Directors; to sell, to pledge and to otherwise dispose of any or all bonds, debentures, notes or other obligations of the Corporation; to purchase and to otherwise acquire shares of its own capital stock and to hold, to sell, to assign, to transfer and to reissue any or all of such shares.

15. To acquire, to hold, to use, to sell, to assgin, to lease, to mortgage and to otherwise dispose of letters patent of

[fol. 115] the United States or of any other country, patents, patent rights, copyrights, licenses and privileges, inventions, improvements and processes, trade marks and trade names or pending applications therefor, relating to or useful in connection with any business of the Corporation or of any other company or association in which the Corporation may have an interest directly or indirectly as a stockholder or otherwise.

16. To deal in stocks and securities either as an agent or broker or underwriter, or otherwise; to make advances or loans, upon the pledge of securities to be bought, sold or otherwise dealt in, or without security, so far as may be permitted by law.

17. To have and to exercise all the powers now or hereafter conferred by the laws of the State of Delaware upon corporations organized under the laws under which the Corporation is organized and any and all Acts amendatory thereof and supplemental thereto.

18. To conduct business in the State of Delaware, other States, the District of Columbia, the territories and colonies of the United States and in foreign countries, and to have one or more offices out of the State of Delaware, as well as within said State, and to hold, purchase, mortgage and convey, real and personal property out of the State of Delaware as well as within said State; provided, however, that nothing herein contained shall be deemed to authorize the Corporation to construct, maintain and/or to operate public utilities within the State of Delaware.

19. Generally to carry on and undertake any other lawful business of the same general nature, which may from time to time seem to the directors of the Corporation capable of being conveniently carried on in connection with the above objects, or calculated directly or indirectly to render valuable or enhance the value of any of the Corporation's properties, privileges or rights.

20. Generally to perform any and all acts connected with, arising from or incidental to the business to be carried on by the Corporation, and to do all acts proper and necessary for the purposes of its business.

The foregoing clauses shall be construed both as objects and powers; and it is hereby expressly provided that the

foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of the Corpo- [fol. 116] ration, and that the Corporation may do all and everything reasonably necessary for the accomplishment of any of the objects or powers hereinbefore enumerated, either alone or in association with other corporations, associations, firms or individuals to the same extent and as fully as individuals might or could do as principals, agents, contractors or otherwise.

Fourth: The total number of shares of Capital Stock authorized and which may be issued by the Corporation is Thirteen Million (13,000,000) shares, all without nominal or par value, of which One Million (1,000,000) shares shall be First Preferred Stock. Two Million (2,000,000) shares shall be Preference Stock, and Ten Million (10,000,000) shares Common Stock.

A description of the different classes of stock of the Corporation, a statement of the relative rights of the holders of stock of such classes, a statement of the limits of variation between each series of First Preferred Stock and between each series of Preference Stock as to amount of preference upon distribution of assets, rate of dividends, premium on redemption, conversion price or otherwise, and a statement of the voting powers and the designations, preferences and relative, participating, optional or other special rights or qualifications, limitations or restrictions thereof of the various classes of stock or series thereof, except so far as the Board of Directors is expressly authorized to determine the same for the various series of the First Preferred Stock and of the Preference Stock are as follows:

First Preferred Stock

(A) First Preferred Stock of the Corporation may be issued in various series, as may be determined from time to time by the Board of Directors, each of such series to be distinctly designated. All shares of any one series of First Preferred Stock shall be alike in every particular and all series hereafter created shall rank equally and be identical in all respects, except as hereinafter in paragraphs (1) to (5) inclusive of this clause A set forth:

(1) The dividend rate on the First Preferred Stock of each series, shall be such rate as may be determined by

the Board of Directors of the Corporation in the resolutions providing for the issuance of the First Preferred [fol. 117] Stock of such series and as shall be stated in the certificates of stock therefor.

(2) The First Preferred Stock of any series may, but need not be, made redeemable at the option of the Corporation at such price (not less than One Hundred Dollars ($100.00), nor more than One Hundred Fifteen Dollars ($115.00) per share, plus in every case an amount equal to all cumulative dividends on such share, both accrued and in arrears up to the date fixed for redemption, whether or not the same shall have been declared or earned) as may be determined by the Board of Directors in the resolutions providing for the issuance of the First Preferred Stock of such series and as shall be stated in the certificates of stock therefor.

(3) The dates on which dividends, if declared, shall be payable in the case of First Preferred Stock of each series, shall be such dates as may be fixed by the Board of Directors in the resolutions providing for the issuance of the First Preferred Stock of such series and as shall be stated in the certificates of stock therefor. The periods between such dates, commencing on such dates, are herein designated as "dividend periods".

(4) The Board of Directors may, in connection with the issue of any series of First Preferred Stock, provide for a Sinking Fund for the First Preferred Stock of such series, installments for which may be made payable in priority to any dividends upon the Preference Stock and the Common Stock of the Corporation, to be applied to the purchase or redemption of shares of such series, the terms and provisions governing the operation of any such Sinking Fund to be as determined by the Board of Directors in the resolutions providing for the issuance of the First Preferred Stock of such series and as shall be stated in the certificates of stock therefor. The First Preferred Stock retired by the operation of any such Sinking Fund shall not be reissued.

(5) The Board of Directors may, in connection with the issue of any series of First Preferred Stock, provide that the shares of such series may be convertible into, or exchangeable for, shares of any other class or classes or of

any other series of the same or any other class or classes of stock of this Corporation, at such conversion price or [fol. 118] prices or at such rates of exchange and with such adjustments as shall be stated and expressed by the Board of Directors in the resolutions providing for the issuance of the First Preferred Stock of such series and as shall be stated in the certificates of stock therefor.

(B) The following provisions shall apply to all the First Preferred Stock of the Corporation irrespective of any variations between the First Preferred Stock of the different series:

(1) The holders of the First Preferred Stock of each series shall be entitled to receive dividends payable on such dates as may be determined for such series, when and as declared by the Board of Directors, at the rates determined for the respective series, from the first day of the current dividend period within which such stock shall have been originally issued, before any dividend shall be declared or paid upon or set apart for Preference Stock and the Common Stock of the Corporation and before any payments are made to any Sinking Fund created as herein provided for any series of First Preferred Stock and/or Preference Stock. Such dividends shall be cumulative, so that, if in any dividend period or periods dividends shall not have been paid or declared and set apart for payment upon all outstanding First Preferred Stock at the rates determined for the respective series, the deficiency shall be fully paid, or declared and set apart for payment, before any dividends shall be declared or paid upon or set apart for the Preference Stock and/or the Common Stock of the Corporation and before any payments are made to any Sinking Fund created as herein provided for any series of First Preferred Stock and/or Preference Stock. Dividends shall not be declared and paid on the First Preferred Stock of any one series for any dividend period unless dividends have been or are contemporaneously paid or declared and set apart for payment thereof on the First Preferred Stock of all series, for all the dividend periods terminating on the same or an earlier date.

(2) When full cumulative dividends as aforesaid upon the First Preferred Stock of all series then outstanding for all past dividend periods and for the current dividend

period shall have been paid or declared and set apart for payment, and after complying with all provisions in respect of any sinking fund or funds for the First Preferred [fol. 119] Stock of any series entitled thereto, installments for which have been made payable in priority to any dividends on the Preference Stock and the Common Stock of the Corporation, the Board of Directors may, subject to the provisions hereof in respect to the Preference and Common Stock, declare dividends on the Preference Stock and/or the Common Stock of the Corporation, and no holders of any series of the First Preferred Stock as such shall be entitled to share therein.

(3) Upon any dissolution, liquidation or winding up of the Corporation, whether voluntary or involuntary, or upon any reduction of that portion of the capital of the Corporation that has been set up out of the consideration received for any of the shares of the Common stock of the Corporation, followed presently by the distribution to stockholders of assets of the Corporation which have been constituted surplus by such reduction, the holders of the First Preferred Stock of every series shall be entitled to receive out of the assets of the Corporation One Hundred Dollars ($100.00) per share, plus an amount equal to accrued dividends, before any distribution of the assets to be distributed shall be made to the holders of Preference and/or Common Stock of the Corporation; but they shall be entitled to no further participation in such distribution. After payment to the holders of the First Preferred Stock of the full preferential amounts hereinbefore provided for, the holders of the First Preferred Stock as such shall have no right or claim to any of the remaining assets of the Corporation, either upon any distribution of surplus assets or upon dissolution, liquidation or winding up. The remaining assets to be distributed, if any, upon a distribution of surplus assets or upon dissolution, liquidation or winding up, shall be distributed among the holders of the Preference Stock and/or the Common stock of the Corporation. The sale of all the property of the Corporation to, or the merger or consolidation of the Corporation into or with any other corporation shall not be or be deemed to be a distribu-

tin of assets or a dissolution, liquidation or winding up for the purposes of this paragraph.

(4) At the option of the Board of Directors of the Cor-
[fol. 120] poration, the Corporation may redeem any series of First Preferred Stock determined to be redeemable, or any part of any series, at any time at the redemption price determined for such series; provided, however, that not less than thirty nor more than sixty days previous to the date fixed for redemption a notice of the time and place thereof shall be given to the holders of record of the First Preferred Stock so to be redeemed, by mail or publication, in such manner, as may be prescribed by the By-Laws of the Corporation, or by resolution of the Board of Directors; and provided, further, that in every case of redemption of less than all of the outstanding shares of any one series of First Preferred Stock, the shares of such series to be redeemed shall be chosen by lot in such manner as may be prescribed by resolution of the Board of Directors. At any time after notice of redemption has been given in the manner prescribed by the By-Laws of the Corporation or by resolution of the Board of Directors to the holders of stock so to be redeemed, the Corporation may deposit, or may cause its nominee to deposit, the aggregate redemption price, with some bank or trust company in the Borough of Manhattan, The City of New York, named in such notice, payable on the date fixed for redemption as aforesaid and in the amounts aforesaid to the respective orders of the holders of the shares so to be redeemed, on endorsement to the Corporation or its nominee, or otherwise, as may be required, and upon surrender of the certificates for such shares. Upon the deposit of said money as aforesaid, or, if no such deposit is made, upon said redemption date (unless the Corporation defaults in making payment of the redemption price as set forth in such notice), such holders shall cease to be stockholders with respect to said shares, and from and after the making of said deposit, or, if no such deposit is made, after the redemption date (the Corporation not having defaulted in making payment of the redemption price as set forth in such notice), the said holders shall have no interest in or claim against the Corporation, or its nominee, with respect to said shares, but shall be entitled only to receive said monies on the date fixed for redemption as aforesaid from said bank or trust

company, or from the Corporation, without interest thereon, upon endorsement, if required, and surrender of the certificates as aforesaid.

[fol. 121] If such deposit shall be made by a nominee of the Corporation as aforesaid, such nominee shall upon such deposit become the owner of the shares with respect to which such deposit was made and certificates of stock may be issued to such nominee in evidence of such ownership.

In case the holder of any such First Preferred Stock shall not, within six years after said deposit, claim the amount deposited as above stated for the redemption thereof, the Depositary shall upon demand pay over to the Corporation such amounts so deposited and the Depositary shall thereupon be relieved from all responsibility to the holder thereof.

Nothing herein contained shall limit any legal right of the Corporation to purchase any shares of the First Preferred Stock.

(5) At all meetings of the stockholders of the Corporation the holders of the First Preferred Stock shall be entitled to one vote for each share of such First Preferred Stock held by them respectively.

(6) The term "accrued dividends" and "dividends accrued and in arrears" shall be deemed to mean in respect of any share of the First Preferred Stock of any series, as of any given date, the amount, if any, by which the product of the rate of dividend per annum, determined upon the shares of such series, multiplied by the number of years and/or parts thereof which shall have elapsed from the date after which dividends on such stock became cumulative to such given date, exceeds the total dividends actually paid on such stock and/or declared and set apart for payment. Accumulations of dividends shall not bear interest.

Preference Stock.

(A) The Preference Stock of the Corporation may be issued in one or more series as may be determined from time to time by the Board of Directors, each of such series to be distinctly designated. All shares of any one series of Preference Stock shall be alike in every particular and all series hereafter created shall rank equally and be iden-

tical in all respects except as hereinafter in paragraphs (1) to (5) inclusive in this Clause (A) set forth:

(1) The dividend rate on the Preference Stock of each series shall be such rate as may be determined by the Board [fol. 122] of Directors of the Corporation in the resolutions providing for the issuance of the Preference Stock of such series and as shall be stated in the certificates of stock therefor.

(2) The Preference Stock of any series may, but need not be, made redeemable at the option of the Corporation at such price (not less than Fifty Dollars ($50.00) nor more than Sixty Dollars ($60.00) per share plus in every case an amount equal to all cumulative dividends on such share both accrued and in arrears up to the date fixed for redemption whether or not the same shall have been declared or earned) as may be determined by the Board of Directors in the resolutions providing for the issuance of the Preference Stock of such series and as shall be stated in the certificates of stock therefor.

(3) The dates on which dividends, if declared, shall be payable in the case of Preference Stock of each series, shall be such dates as may be fixed by the Board of Directors in the resolutions providing for the issuance of the Preference Stock of such series and as shall be stated in the certificates of stock therefor. The periods between such dates, commencing on such dates, are herein designated as "dividend periods".

(4) The Board of Directors may, in connection with the issue of any series of Preference Stock, provide for a Sinking Fund for the Preference Stock of such series, instalments for which may be made payable in priority to any dividends upon the Common Stock of the Corporation, to be applied to the purchase or redemption of the shares of such series, the terms and provisions governing the operation of any such Sinking Fund to be as determined by the Board of Directors in the resolutions providing for the issuance of the Preference Stock of such series and as shall be stated in the certificates of stock therefor. The Preference Stock retired by the operation of any such Sinking Fund shall not be reissued.

(5) The Board of Directors may, in connection with the issue of any series of Preference Stock, provide that the shares of such series may be convertible into or exchangeable for, shares of any other class or classes or of any other series of the same or of any other class or classes of stock of this Corporation, at such conversion price or prices or at such rates of exchange and with such adjustments as shall be [fol. 123] stated and expressed by the Board of Directors in the resolutions providing for the issuance of the Preference Stock of such series and as shall be stated in the certificates of stock therefor.

(B) The following provisions shall apply to all the Preference Stock of the Corporation, irrespective of any variations between the Preference Stock of the different series:

(1) The holders of the Preference Stock of each series shall be entitled to receive dividends payable on such dates as may be determined for such series, when and as declared by the Board of Directors, at the rates determined for the respective series, from the first day of the current dividend period within which such stock shall have been originally issued, before any dividends shall be declared or paid upon or set apart for the Common Stock of the Corporation and before any payments are made to any Sinking Fund created as herein provided for any series of Preference Stock. Such dividends shall be cumulative, so that, if in any dividend period or periods dividends shall not have been paid or declared and set apart for payment upon all outstanding Preference Stock at the rates determined for the respective series, the deficiency shall be fully paid, or declared and set apart for payment, before any dividends shall be declared or paid upon or set apart for the Common Stock of the Corporation and before any payments are made to any Sinking Fund created as herein provided for any series of Preference Stock. Dividends shall not be declared and paid on the Preference Stock of any one series for any dividend period unless dividends have been or are contemporaneously paid or declared and set apart for payment thereof on the Preference Stock of all series, for all the dividend periods terminating on the same or an earlier date.

(2) When full cumulative dividends as aforesaid upon the Preference Stock of all series then outstanding for all past

dividend periods and for the current dividend periods shall have been paid or declared and set apart for payment, and after complying with all provisions in respect of any sinking fund or funds for the Preference Stock of any series entitled thereto, installments for which have been made payable in priority to any dividends on the Common Stock of the Corporation, the Board of Directors may declare dividends [fol. 124] on the Common Stock of the Corporation, and no holders of any series of the Preference Stock as such shall be entitled to share therein.

(3) Upon any dissolution, liquidation or winding up of the Corporation, whether voluntary or involuntary, or upon any reduction of that portion of the capital of the Corporation that has been set up out of the consideration received for any of the shares of the Common Stock of the Corporation, followed presently by the distribution to stockholders of assets of the Corporation which have been constituted surplus by such reduction the holders of the Preference Stock of every series shall be entitled to receive out of the assets of the Corporation Fifty Dollars ($50) per share, plus an amount equal to accrued dividends, before any distribution of the assets to be distributed shall be made to the holders of Common Stock of the Corporation; but they shall be entitled to no further participation in such distribution. After payment to the holders of the Preference Stock of the full preferential amounts hereinbefore provided for, the holders of the Preference Stock as such shall have no right or claim to any of the remaining assets of the Corporation, either upon any distribution of surplus assets or upon dissolution, liquidation or winding up. The remaining assets to be distributed, if any, upon a distribution of surplus assets or upon dissolution, liquidation or winding up, shall be distributed among the holders of the Common Stock of the Corporation. The sale of all the property of the Corporation to, or the merger or consolidation of the Corporation into or with, any other Corporation shall not be or be deemed to be a distribution of assets, or a dissolution, liquidation or winding up for the purposes of this paragraph.

(4) At the option of the Board of Directors of the Corporation, the Corporation may redeem any series of Preference Stock determined to be redeemable, or any part of any series, at any time at the redemption price determined for such series; provided, however, that not less than thirty nor more

than sixty days previous to the date fixed for redemption a notice of the time and place thereof shall be given to the holders of record of the Preference Stock so to be redeemed by mail or publication, in such manner as may be prescribed by the By-Laws of the Corporation, or by resolution of the [fol. 125] Board of Directors; and provided, further, that in every case of redemption of less than all of the outstanding shares of any one series of Preference Stock, the shares of such series to be redeemed shall be chosen by lot in such manner as may be prescribed by resolution of the Board of Directors. At any time after notice of redemption has been given in the manner prescribed by the By-Laws of the Corporation or by resolution of the Board of Directors to the holders of stock so to be redeemed, the Corporation may deposit, or may cause its nominee to deposit, the aggregate redemption price, with some bank or trust company in the Borough of Manhattan, The City of New York, named in such notice, payable on the date fixed for redemption as aforesaid and in the amounts aforesaid to the respective orders of the holders of the shares so to be redeemed, on endorsement to the Corporation or its nominee, or otherwise, as may be required, and upon surrender of the certificates for such shares. Upon the deposit of said money as aforesaid, or, if no such deposit is made, upon said redemption date (unless the Corporation defaults in making payment of the redemption price as set forth in such notice), such holders shall cease to be stockholders with respect to such shares, and from and after the making of said deposit, or, if no such deposit is made, after the redemption date (the Corporation not having defaulted in making payment of the redemption price as set forth in such notice), the said holders shall have no interest in or claim against the Corporation, or its nominee, with respect to said shares, but shall be entitled only to receive said monies on the date fixed for redemption as aforesaid from said bank or trust company, or from the Corporation, without interest thereon, upon endorsement, if required, and surrender of the certificates as aforesaid.

If such deposit shall be made by a nominee of the Corporation as aforesaid, such nominee shall upon such deposit become the owner of the shares with respect to which such deposit was made and certificates of stock may be issued to such nominee in evidence of such ownership.

In case the holder of any such Preference Stock shall not, within six years after said deposit, claim the amount deposited as above stated for the redemption thereof, the De- [fol. 126] positary shall upon demand pay over to the Corporation such amounts so deposited and the Depositary shall thereupon be relieved from all responsibility to the holder thereof.

Nothing herein contained shall limit any legal right of the Corporation to purchase any shares of the Preference Stock.

(5) At all meetings of the stockholders of the Corporation the holders of the Preference Stock shall be entitled to one vote for each share of such Preference Stock held by them respectively.

(6) The term "accrued dividends" and "dividends accrued and in arrears" shall be deemed to mean in respect of any share of the Preference Stock of any series, as of any given date, the amount, if any, by which the product of the rate of dividend per annum, determined upon the shares of such series, multiplied by the number of years and/or parts thereof which shall have elapsed from the date after which dividends on such stock became cumulative to such given date, exceeds the total dividends actually paid on such stock and/or declared and set apart for payment. Accumulations of dividends shall not bear interest.

Common Stock

None of the shares of the Common Stock shall be entitled to any preferences and each share of Common Stock shall be equal to every other share of said stock in every respect.

Dividends:

Out of any assets of this Corporation available for dividends remaining after full cumulative dividends on all stock having priority over the Common Stock shall have been paid or declared and set aside for payment and after complying with all provisions in respect of any sinking fund or funds for the First Preferred Stock and/or Preference Stock and after making such provision, if any, as the Board of Directors may deem necessary or advisable for working capital and reserves, then, and not otherwise, dividends may be paid upon the Common Stock but only when and as determined by the Board of Directors.

Distribution of Assets:

In the event of any liquidation, dissolution or winding up of this Corporation or any other proceeding resulting in any [fol. 127] distribution of all its assets to its stockholders, after there have been paid to or set aside for the holders of all stock having priority over the Common Stock the full preferential amounts to which they are respectively entitled, the holders of the Common Stock shall be entitled to receive pro rata all of the remaining assets of this Corporation available for distribution to its stockholders. The Board of Directors, by vote of a majority of the members thereof, may distribute in kind to the holders of the Common Stock such remaining assets of this Corporation, or may sell, transfer or otherwise dispose of all of the remaining property or assets of this Corporation to any other corporation and receive payment therefor wholly or partly in cash and/or in stock and/or in obligations of such corporation, and may sell all or any of the consideration received therefor and distribute the balance thereof in kind to the holders of the Common Stock.

Voting Power:

At all meetings of the stockholders of the Corporation the holders of the Common Stock shall be entitled to one vote for each share of such Common Stock held by them respectively.

Option Warrants

The Board of Directors shall have power at any time or from time to time (without any action by the stockholders of this Corporation) in the name and on behalf of this Corporation to grant rights or options to run for any period of time, including an unlimited period of time, to purchase from this Corporation any shares of its stock of any class or classes for any consideration (not less than par if such shares have par value) and upon any terms and conditions and to create and issue warrants or other instruments representing such rights or options in any form; all as the Board of Directors may, in its sole discretion, determine.

General Provisions

Consideration Receivable for No Par Value Stock:

Shares of Capital Stock of this Corporation without nominal or par value of any class or classes, hereby or hereafter

authorized, may be issued by this Corporation from time to [fol. 128] time for such consideration as may be fixed from time to time by the Board of Directors. Said Board shall have authority, as provided by Statute, to determine that only a part of the consideration, which shall be received by this Corporation for any of the shares of its Capital Stock which it shall issue from time to time, shall be capital.

Fifth. The Corporation is to have perpetual existence.

Sixth. The private property of the stockholders of the Corporation shall not be subject to the payment of corporate debts to any extent whatever.

Seventh. The By-Laws of The United Corporation shall remain the By-Laws of the Corporation until altered or amended according to law and as prescribed by said By-Laws.

Eighth. The number of directors of the Corporation shall be fixed by the By-Laws, and may be altered from time to time by amendment of such By-Laws, adopted by the Board of Directors or by the stockholders in the manner provided therein, but such number shall never be less than five. Vacancies caused by an increase in the number of Directors or otherwise may be filled by the Board of Directors in the manner provided in the By-Laws. Directors need not be stockholders. Any director may be removed at any time with or without cause upon the affirmative vote of the holders of a majority of the stock of the Corporation at that time entitled to vote for directors.

The first Board of Directors shall consist of the individuals who are Directors of The United Corporation at the date hereof. Said persons shall be and continue to be the Directors until the next annual meeting of the stockholders of the Corporation or until their successors are respectively elected and qualify in accordance with the By-Laws. All persons who at the time this agreement becomes effective shall be the officers of The United Corporation shall remain such officers of the Corporation until the Board of Directors shall otherwise determine.

Ninth. The following additional provisions are inserted for the regulation of the business and for the conduct of the affairs of this Corporation and its directors and stockholders:

(1) The Board of Directors shall have power from time [fol. 129] to time to fix and determine and to vary the amount to be reserved as a working capital of the Corporation and, before the payment of any dividends or making any distribution of profits, it may set aside out of the net profits of the Corporation such sum or sums as it may from time to time in its absolute discretion think proper whether as a reserve fund to meet contingencies or for the equalizing of dividends or for repairing or maintaining any property of the Corporation or for such corporate purposes as the Board shall think conducive to the interests of the Corporation, subject only to such limitations as the By-Laws of the Corporation may from time to time impose.

(2) In the absence of fraud no contract or other transaction between this Corporation and any other corporation shall be effected by the fact that directors of this Corporation are directors of such other corporation, if such contract or transaction shall be approved or ratified by the affirmative vote of a majority of the directors present at a meeting of the Board of Directors or the Committee of this Corporation having authority in the premises, who are not so interested. Any director individually, or any firm of which any director is a partner, may be a party to or may be interested in any contract or transaction of this Corporation provided that such contract or transaction shall be approved or ratified by the affirmative vote of at least a majority of the directors present at a meeting of the Board of Directors or the Committee of the Corporation having authority in the premises, who are not so interested. Nor shall any Director be liable to account to this Corporation for any profit realized by him from or through any such transaction or contract of this Corporation, ratified or approved as aforesaid, by reason of his interest in such transaction or contract. Directors so interested may be counted when present at meetings of the Board of Directors or of such committee for the purpose of determining the existence of a quorum. Any director whose interest in any such contract or transaction arises solely by reason of the fact that he is a stockholder, officer or creditor of such other company (or solely by reason of the fact that he is a director of such other company or partner in such firm where such dealing, contract or arrangement is made by officers or employees of the Corporation in the ordinary

[fol.130] performance of their duties and without the actual participation of such director) shall not be deemed interested in such contract or other transaction under any of the provisions of this paragraph, nor shall any such contract or transaction be void or voidable, nor shall any such director be liable to account because of such interest nor need any such interest be disclosed. Any contract or act that shall be approved or ratified by the vote of the holders of a majority of the capital stock of the Corporation having voting powers which is represented in person or by proxy at any annual meeting of stockholders or at any special meeting called for the purpose, among others, of considering the approval or ratification of the acts of officers and/or directors (provided that a lawful quorum of stockholders be there represented in person or by proxy) shall be as valid and as binding upon the Corporation and upon all its stockholders as though it had been approved or ratified by every stockholder of the Corporation.

(3) The Board of Directors shall also have power without the assent or vote of the stockholders to make, alter, amend and repeal the By-laws of the Corporation; to fix the times for the declaration and payment of dividends; to authorize and cause to be executed and delivered mortgages on and instruments of pledge, or any other instruments creating liens on the real and personal property of the Corporation; to fix from time to time the consideration for which stock of the Corporation without nominal or par value may be issued and to determine what part of such consideration shall be capital; to make and determine the use and disposition of any surplus or net profits over and above the capital stock paid in, and in its discretion the Board of Directors may use and apply any such surplus or accumulated profits in purchasing or acquiring shares of its own capital stock to such extent and in such manner and upon such terms as the Board of Directors shall deem expedient; the shares of such capital stock so purchased or acquired may be resold unless such shares shall have been retired for the purpose of decreasing the Corporation's capital stock as provided by law.

(4) Subject to direction by resolution of a majority of the stockholders the Board of Directors shall have power from time to time to determine whether and to what extent [fol.131] and what times and places and under what con-

ditions and regulations the accounts and books of the corporation (other than the stock ledger) or any of them, shall be open to the inspection of stockholders; and no stockholder shall have any right to inspect any account or book or document of the Corporation except as conferred by statute or authorized by the directors or by a resolution of the stockholders.

(5) The Board of Directors shall have the power to appoint an Executive Committee from among their number, which Committee, to the extent and in the manner provided in the By-Laws of the Corporation, shall have and may exercise all of the powers of the Board of Directors, so far as may be permitted by law, in the management of the business and affairs of the Corporation whenever the Board of Directors is not in session. The fact that the Executive Committee has acted shall be conclusive evidence that the Board of Directors was not in session at the time of such action.

(6) The Board of Directors, in addition to the powers and authority expressly conferred upon it hereinbefore and by statute and by the By-laws, is hereby empowered to exercise all such powers as may be exercised by the Corporation; subject, nevertheless, to the provisions of the statutes of the State of Delaware, of this Agreement of Merger and Consolidation and to any regulations that may from time to time be made by the stockholders, provided that no regulation so made shall invalidate any provision of this Agreement of Merger and Consolidation or any prior act of the directors which would have continued valid if such regulation had not been made.

Tenth. Whenever a compromise or arrangement is proposed between this Corporation and its creditors or any class of them and/or between this Corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this Corporation or of any creditor or stockholder thereof, or on the application of any receiver or receivers appointed for this Corporation under the provisions of Section 3883 of the Revised Code of 1915 of said State, or on the application of trustees in dissolution or of any receiver or receivers appointed for this Corporation under the provisions of Section 43 of this Chapter,

order a meeting of the creditors or class of creditors, [fol. 132] and/or of the stockholders or class of stockholders of this Corporation, as the case may be, to be summoned in such manner as the said Court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as a consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the Court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this Corporation, as the case may be, and also on this Corporation.

Eleventh. The Corporation reserves the right to increase or decrease its authorized capital stock, or any class or series thereof, or to reclassify the same, and to amend, alter, change or repeal any provision contained in the Agreement of Merger and Consolidation under which the Corporation is organized or in any amendment thereto, in the manner now or hereafter prescribed by law, and all rights conferred upon stockholders in said Agreement of Merger and Consolidation or any amendment thereto are granted subject to this reservation; provided, however, that the Corporation shall not decrease the amounts which any class or series of First Preferred Stock and/or Preference Stock shall be entitled to receive as dividends or upon a distribution of assets in preference to any other class, or decrease the redemption price of such class or series, unless the holders of all the First Preferred Stock and/or Preference Stock of such class or series so affected adversely shall consent thereto.

Twelfth. No stockholder shall be entitled as a matter of right to subscribe for, purchase or receive any shares of the stock or option warrants of the Corporation which it may issue or sell, whether out of the number of shares authorized by this Agreement of Merger and Consolidation or by amendment thereof or out of the shares of the stock of the Corporation acquired by it after the issuance thereof, nor shall any stockholder be entitled as a matter of right to purchase or subscribe for or receive any bonds, deben-

tures or other obligations which the Corporation may issue or sell that shall be convertible into or exchangeable for [fol. 133] stock or to which shall be attached or appertain any warrant or warrants or other instrument or instruments that shall confer upon the holder or owner of such obligation the right to subscribe for or purchase from the Corporation any shares of its Capital Stock. But all such additional issues of stock, option warrants, or of bonds, debentures or other obligations convertible into or exchangeable for stock or to which warrants shall be attached or appertain or which shall confer upon the holder the right to subscribe for or purchase any shares of stock may be issued and disposed of by the Board of Directors to such persons and upon such terms as in their absolute discretion they may deem advisable.

Thirteenth. The manner of converting the shares of each of the Constituent Corporations into shares of the Corporation, shall be as follows:

(a) All the shares of the $3 Cumulative Preference Stock and Common Stock of The United Corporation, one of the Constituent Corporations, outstanding when this Agreement becomes effective shall remain shares of the like classes of stock of the Corporation, share for share, and the certificates therefor outstanding when this Agreement becomes effective shall remain and are hereby adopted and declared to be certificates of the Corporation until the Board of Directors shall adopt another form of certificate therefor, and all options or rights to purchase Common Stock of The United Corporation outstanding when this Agreement becomes effective represented by Option Warrants shall remain options or rights to purchase Common Stock of the Corporation upon the same terms as the holders had been entitled to purchase Common Stock of The United Corporation and the Option Warrants representing said options or rights therefor outstanding when this Agreement becomes effective, shall remain and are hereby adopted and declared to be the Option Warrants of the Corporation, until the Board of Directors shall adopt another form of Option Warrant.

(b) Each holder of the capital stock of The Public Electric Holding Corporation outstanding when this Agreement becomes effective upon surrender of certificates represent-

ing such stock for cancellation at such office or agency of the [fol. 134] Corporation as shall be designated by it for the purpose, duly endorsed in blank for transfer, if required, shall receive $3 Cumulative Preference Stock, Common Stock and Option Warrants of the Corporation at the rate of 34.4187 shares of $3 Cumulative Preference Stock, 221.-0853 shares of Common Stock and Option Warrants entitling the holder to purchase 100 shares of Common Stock for each share of the capital stock of The Public Electric Holding Corporation so surrendered. The Option Warrants (until the Board of Directors shall adopt another form) shall be in the same form as the Option Warrants which had been created by The United Corporation, one of the constituent corporations under the terms of its Charter and which were outstanding at the time of this merger and consolidation, and will entitle the holders thereof to purchase at any time without limit full paid and non-assessable shares of Common Stock of the Corporation as such Common Stock may be constituted at the time of its purchase at the price of Twenty-seven and 50/100 ($27.50) Dollars per share but subject to such further conditions and provisions as therein stated.

Fourteenth. In accordance with the provisions of the General Corporation Law of the State of Delaware, this Agreement shall become effective only upon its due adoption at stockholders' meetings of the respective Constituent Corporation, the certification of such fact on the Agreement by the Secretary of each such corporation under the seal thereof, the proper execution and acknowledgment of this Agreement and the filing and recording of the same as required by law. When the Agreement is so signed, acknowledged, filed and recorded, the separate existence of The Public Electric Holding Corporation shall cease, and The Public Electric Holding Corporation shall be merged into The United Corporation in accordance with this Agreement, and the Corporation shall possess all the rights, privileges, powers and franchises of a public as well as a private nature, and be subject to all the restrictions, disabilities and duties of each of such corporations so consolidated and merged, and all and singular the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said Constituent Corporations on whatever ac-

count as well for stock subscriptions as all other things in [fol. 135] action or belonging to each of such corporations shall be vested in the Corporation; and all property, rights, privileges, powers and franchises and all and every other interest shall be thereafter as effectually the property of the Corporation as they were of the several and respective Constituent Corporations, and the title to any real estate whether by deed or otherwise under the laws of the State of Delaware, vested in any of such Constituent Corporations, shall not revert or be in any way impaired by reason of such merger and consolidation or of the act under and pursuant to which it is effective; provided, that all rights of creditors and all liens upon the property of any of said Constituent Corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective Constituent Corporations shall henceforth attach to the Corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

In witness whereof each of the Constituent Corporations pursuant to resolutions passed by their respective Boards of Directors at meetings thereof duly held, has caused these presents to be signed in its name, and a majority of the Board of Directors of each of the Constituent Corporations have hereunto set their hands and the respective corporate seals as of the day and year first above written.

The United Corporation, by George Roberts, President. (The United Corporation Corporate Seal, 1929, Delaware.)

Attest: G. Herbert Semler, Secretary.

Directors of The United Corporation: L. K. Thorne. George Roberts. George Whitney. Thomas S. Gates.

The Public Electric Holding Corporation, by Hamilton Hadley, President. (The Public Electric Holding Corporation, Corporate Seal, 1929, Delaware.)

Attest: Hayden N. Smith, Secretary.

[fol. 136] Directors of The Public Electric Holding Corporation: Hamilton Hadley. Sherman Ewing. Hayden N. Smith.

9—19 & 29

Certificate of Secretary of The United Corporation

I, G. Herbert Semler, Secretary of The United Corporation, a Delaware corporation, hereby certify as Secretary under the seal of said corporation that the Agreement of Merger and Consolidation on which this certificate is made, after first being duly signed by a majority of the Directors of said corporation, and by a majority of the Directors of The Public Electric Holding Corporation, also a Delaware corporation, was duly submitted to the Stockholders of The United Corporation at a Special Meeting thereof duly held separately for the purpose of taking said Agreement of Merger and Consolidation into consideration in accordance with the provisions of the statutes of the State of Delaware applicable thereto; and that at said meeting said Agreement of Merger and Consolidation was considered and a vote by ballot in person or by proxy was taken for the adoption or rejection of the same, each share entitling the holder thereof to one vote, and that the votes of Stockholders of the said The United Corporation representing two-thirds of the total number of shares of its Capital Stock were for the adoption of said Agreement of Merger and Consolidation.

Witness my hand and the seal of said The United Corporation this 11th day of January, 1929.

G. Herbert Semler, Secretary. (The United Corporation Corporate Seal, 1929, Delaware.)

The United Corporation has caused the foregoing Agreement of Merger and Consolidation, adopted and certified as aforesaid, to be signed under its corporate name and seal by its President and its Secretary thereunto duly authorized this 11th day of January, 1929.

The United Corporation, by George Roberts, President; G. Herbert Semler, Secretary.

[fol. 137] Acknowledgment of President of The United Corporation

STATE OF NEW YORK,
County of New York, ss:

I, Wm. A. Merrick, a Notary Public in and for said County, in the State aforesaid, do hereby certify that George Roberts, the President of The United Corporation, a Delaware corporation, who is personally known to me to be the same person whose name is subscribed to the foregoing

Agreement of Merger and Consolidation as such President, and who is personally known to me to be the President of said corporation, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said Agreement as his free and voluntary act as such President, and as the free and voluntary act, deed and Agreement of said corporation for the uses and purposes therein set forth, and further acknowledged said Agreement to be the act, deed and Agreement of said corporation.

Given under my hand and notarial seal this 11th day of January, 1929.

William A. Merrick, Notary Public. Notary Public, Kings County, N. Y. Cft. No. 914. Certificate filed in New York County No. 146. Registrar's Office N. Y. Co. County Cft. No. 0.161. Registrars Office Kings County N. Y. Ctf. No. 213. Commission expires March 30, 1930. (Seal of Wm. A. Merrick, Notary Public, Kings Co. N. Y.)

Certificate of Secretary of The Public Electric Holding Corporation

I, Hayden N. Smith, Secretary of The Public Electric Holding Corporation, a Delaware corporation, hereby certify as Secretary under the seal of said corporation that the Agreement of Merger and Consolidation on which this certificate is made, after first being duly signed by a majority of the Directors of said corporation and by a majority of the Directors of The United Corporation, also a Delaware corporation, was duly submitted to the Stockholders of The Public Electric Holding Corporation at a Special Meeting thereof duly held separately for the purpose of taking said Agreement of Merger and Consolidation into consideration in accordance with the provisions of the statutes of the State [fol. 138] of Delaware applicable thereto; and that at said meeting said Agreement of Merger and Consolidation was considered and a vote by ballot in person or by proxy was taken for the adoption or rejection of the same, each share entitling the holder thereof to one vote, and that the votes of Stockholders of said The Public Electric Holding Corporation representing two-thirds of the total number of shares of its Capital Stock were for the adoption of said Agreement of Merger and Consolidation.

Witness my hand and the seal of said The Public Electric Holding Corporation this 11th day of January, 1929.

Hayden N. Smith, Secretary. The Public Electric Holding Corporation, Corporate Seal, 1929, Delaware.)

The Public Electric Holding Corporation has caused the foregoing Agreement of Merger and Consolidation, adopted and certified as aforesaid, to be signed under its corporate name and seal by its President and its Secretary thereunto duly authorized this 11th day of January, 1929.

The Public Electric Holding Corporation, by Hamilton Hadley, President; Hayden N. Smith, Secretary.

Acknowledgment of President of The Public Electric Holding Corporation

STATE OF NEW YORK,
County of New York, ss:

I, Walter J. Holzka, a Notary Public in and for said County, in the State aforesaid, do hereby certify that Hamilton Hadley, the President of The Public Electric Holding Corporation, a Delaware corporation, who is personally known to me to be the same person whose name is subscribed to the foregoing Agreement of Merger and Consolidation as such President, and who is personally known to me to be the President of said corporation, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said Agreement as his free and voluntary act as such President, and as the free and voluntary act, deed and Agreement of said corporation for the uses and purposes therein set forth; and further acknowledged said Agreement to be the act, deed and Agreement of said corporation.

[fol. 139] Given under my hand and notarial seal this 11th day of January, 1929.

Walter J. Holzka Notary Public. Notary Public, Richmond County. Certificates Filed in New York County. County Clerks No. 1127; Registers No. 9055A. Commission Expires March 30, 1929. (Sea of Walter J. Holzka Notary Public, Richmond County.)

STATE OF DELAWARE,
Office of Secretary of State:

I, Charles H. Grantland, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Agreement of Merger and Consolidation between "The United Corporation", and "The Public Electric Holding Corporation", under the name of "The United Corporation", as received and filed in this office the twelfth day of January, A. D. 1929, at 10 o'clock a. m.

In testimony whereof, I have hereunto set my hand and official seal, at Dover, this twenty-second day of January in the year of our Lord one thousand nine hundred and twenty-nine.

Charles H. Grantland, Secretary of State. (Seal.)

PETITIONER'S EXHIBIT "J" TO STIPULATION

Admitted in Evidence April 4, 1934

Certificate of Incorporation of The United Corporation
(Organized under the Laws of the State of Delaware)

Certificate of Incorporation of The United Corporation

First. The name of the Corporation (which is hereinafter referred to as the Corporation) is The United Corporation.

Second. The location of its principal office in the State of Delaware is No. 7 West Tenth Street, in the City of Wilmington, County of New Castle. The name of the agent therein and in charge thereof is the Corporation Trust Company of America of No. 7 West Tenth Street, Wilmington, Delaware.

Third. The nature of the business of the Corporation or [fol. 140] objects or purposes proposed to be transacted, promoted or carried on by it are:

1. To acquire and hold the securities of electric power and light and gas companies and other public utility companies and companies owning the stocks or securities of public utility companies.

2. To acquire and hold the securities of companies engaged in the business of managing or operating, or supervising the management or operation of public utility companies, and companies doing a general construction, engineering or contracting business with public utility, and other companies.

3. To invest and deal with the monies of the Corporation in any manner, and to acquire by purchase, by the exchange of stock or other securities of the Corporation, by subscription or otherwise and to invest in, to hold for investment or for any other purpose and to deal in and to use, sell, pledge or otherwise dispose of any stocks, bonds, notes, debentures and other securities and obligations of any Government, State, municipality or corporation or association, or partnership, domestic or foreign, (including without prejudice to the generality of the foregoing the companies described in paragraphs 1 and 2 above), and while owner of any such stocks, bonds, notes, debentures or other securities or obligations, to exercise all the rights, powers and privileges of ownership, including among other things the right to vote thereon for any and all purposes.

4. Either directly or through subsidiary companies to engage in the business of managing, operating and/or supervising the management or operation of public utility companies.

5. Either directly or through subsidiary companies to do a general construction and engineering business with public utility and other companies.

6. To act as financial or business and/or purchasing agent, general or special.

7. To aid in any lawful manner by loan, subsidy, guaranty or otherwise, any company whose stock, bonds, notes, debentures or other securities or obligations are held or controlled directly or indirectly by the Corporation, and to do any and all lawful acts or things necessary or advisable to protect, preserve, improve or enhance the value of [fol. 141] any such stocks, bonds, notes, debentures or other securities or obligations.

8. To guarantee and to assume the payment of any dividends on any shares of the capital stock of any company in which the Corporation may either directly or indirectly

have an interest as stockholder or otherwise, and to assume and to guarantee by endorsement or otherwise the payment of the principal of and the interest on bonds, notes or other obligations created or to be created by any such company.

9. To acquire, to develop, to improve, to sell, to assign, to transfer, to convey, to lease, to sublease, to pledge and to otherwise alienate and dispose of and to mortgage or otherwise encumber real property situate in any part of the world and the fixtures and personal property incident thereto or connected therewith.

10. To develop and turn to account any land owned by the Corporation or in which it has an interest directly or indirectly, and among other things, to lay out and prepare the same for building purposes and to construct, alter and equip buildings and let the same by lease or agreement or otherwise and to advance money to and enter into contracts and arrangements of all kinds with builders, contractors, tenants and others.

11. To purchase, to sell, to manufacture and generally to deal in building materials and goods, wares and merchandise and to carry on any other lawful trade or business incidental to or proper or useful in connection with the purchase, sale, ownership, construction and equipment of its property.

12. To acquire, to hold, to own, to make, to dispose of and generally to deal in grants, concessions, franchises, rights of way and contracts of every kind from or with any person, firm, association, corporation, private, public or municipal, or body politic, and from or with the government or public authorities of the United States, or of any State, territory, possession or dependency thereof, or from or with the District of Columbia, or from or with any foreign government; to cause to be formed, to promote and to aid in any way in the formation of any corporation or association, domestic or foreign.

[fol. 142] 13. To make and enter into all manner and kinds of contracts, agreements and obligations for the purchasing, acquiring, dealing in or selling of any kind and all kinds of property, real and personal.

14. To borrow money, to issue bonds, debentures, notes or other obligations secured or unsecured of the Corpora-

tion; to secure the same by mortgage or mortgages or deed or deeds of trust or pledge or other lien upon any or all of the property, rights, privileges and franchises of the Corporation wheresoever situate, acquired or to be acquired; to confer upon the holders of any debentures, bonds or other obligations of the Corporation secured or unsecured the right to convert the same into any class of stock of any series of the Corporation now or hereafter to be issued upon such terms as shall be fixed by the Board of Directors; to sell, to pledge and to otherwise dispose of any or all bonds, debentures, notes or other obligations of the Corporation; to purchase and to otherwise acquire shares of its own capital stock and to hold, to sell, to assign, to transfer and to reissue any or all of such shares.

15. To acquire, to hold, to use, to sell, to assign, to lease, to mortgage and to otherwise dispose of letters patent of the United States or of any other country, patents, patent rights, copyrights, licenses and privileges, inventions, improvements and processes, trade marks and trade names or pending applications therefor, relating to or useful in connection with any business of the Corporation or of any other company or association in which the Corporation may have an interest directly or indirectly as a stockholder or otherwise.

16. To deal in stocks and securities either as an agent or broker, or otherwise; to make advances or loans, upon the pledge of securities to be bought, sold or otherwise dealt, in, or without security, so far as may be permitted by law.

17. To have and to exercise all the powers now or hereafter conferred by the laws of the State of Delaware upon corporations organized under the laws under which the Corporation is organized and any and all Acts amendatory thereof and supplemental thereto.

18. To conduct business in the State of Delaware, other States, the District of Columbia, the territories and colonies of the United States and in foreign countries, and to have [fol. 143] one or more offices out of the State of Delaware, as well as within said State, and to hold, purchase, mortgage and convey real and personal property out of the State of Delaware as well as within said State; provided, however, that nothing herein contained shall be deemed to

authorize the Corporation to construct, maintain and/or to operate public utilities within the State of Delaware.

19. Generally to carry on and undertake any other lawful business of the same general nature, which may from time to time seem to the directors of the Corporation capable of being conveniently carried on in connection with the above objects, or calculated directly or indirectly to render valuable or enhance the value of any of the corporation's properties, privileges or rights.

20. Generally to perform any and all acts connected with, arising from or incidental to the business to be carried on by the Corporation, and to do all acts proper and necessary for the purposes of its business.

The foregoing clauses shall be construed both as objects and powers; and the foregoing enumeration of specific powers shall not be held to limit or restrict in any manner the powers of the corporation.

Fourth. The total number of shares of Capital Stock authorized and which may be issued by the Corporation is Thirteen Million (13,000,000) shares, all without nominal or par value, of which One Million (1,000,000) shares shall be first Preferred Stock, Two Million (2,000,000) shares shall be Preference Stock, and Ten Million (10,000,000) shares Common Stock.

A description of the different classes of stock of the Corporation, a statement of the relative rights of the holders of stock of such classes, a statement of the limits of variation between each series of First Preferred Stock and between each series of Preference Stock as to amount of preference upon distribution of assets, rate of dividends, premium on redemption, conversion price or otherwise, and a statement of the voting powers and the designations, preferences and relative, participating, optional or other special rights or qualifications, limitations or restrictions thereof of the various classes of stock or series thereof, except so far as the Board of Directors is expressly authorized to [fol. 144] determine the same for the various series of the First Preferred Stock and of the Preference Stock are as follows:

First Preferred Stock

(A) First Preferred Stock of the Corporation may be issued in various series, as may be determined from time to

time by the Board of Directors, each of such series to be distinctly designated. All shares of any one series of First Preferred Stock shall be alike in every particular and all series hereafter created shall rank equally and be identical in all respects, except as hereinafter in paragraphs (1) to (5) inclusive of this clause A set forth:

(1) The dividend rate on the First Preferred Stock of each series shall be such rate as may be determined by the Board of Directors of the Corporation in the resolutions providing for the issuance of the First Preferred Stock of such series and as shall be stated in the certificates of stock therefor.

(2) The First Preferred Stock of any series may, but need not be, made redeemable at the option of the Corporation at such price (not less than One Hundred Dollars ($100.00), nor more than One Hundred Fifteen Dollars ($115.00) per share, plus in each case an amount equal to all cumulative dividends on such share, both accrued up to the date fixed for redemption, whether or not the same shall have been declared or earned, and in arrears) as may be determined by the Board of Directors in the resolutions providing for the issuance of the First Preferred Stock of such series and as shall be stated in the certificates of stock therefor.

(3) The dates on which dividends, if declared, shall be payable in the case of First Preferred Stock of each series, shall be such dates as may be fixed by the Board of Directors in the resolutions providing for the issuance of the First Preferred Stock of such series and as shall be stated in the certificates of stock therefor. The periods between such dates, commencing on such dates, are herein designated as "dividend periods".

(4) The Board of Directors may, in connection with the issue of any series of First Preferred Stock, provide for a Sinking Fund for the First Preferred Stock of such series, installments for which may be made payable in priority to any dividends upon the Preference Stock and/or the [fol. 145] Common Stock of the Corporation, to be applied to the purchase or redemption of shares of such series, the terms and provisions governing the operation of any such Sinking Fund to be as determined by the Board of Direc-

tors in the resolutions providing for the issuance of the First Preferred Stock of such series and as shall be stated in the certificates of stock therefor. The First Preferred Stock retired by the operation of any such Sinking Fund shall not be reissued.

(5) The Board of Directors may, in connection with the issue of any series of First Preferred Stock, provide that the shares of such series may be convertible into, or exchangeable for, shares of any other class or classes or of any other series of the same or any other class or classes of stock of this Corporation, at such conversion price or prices or at such rates of exchange and with such adjustments as shall be stated and expressed by the Board of Directors in the resolutions providing for the issuance of the First Preferred Stock of such series and as shall be stated in the certificates of stock therefor.

(B) The following provisions shall apply to all the first Preferred Stock of the Corporation irrespective of any variations between the First Preferred Stock of the different series:

(1) The holders of the First Preferred Stock of each series shall be entitled to receive dividends payable on such dates as may be determined for such series, when and as declared by the Board of Directors, at the rates determined for the respective series, from the first day of the current dividend period within which such stock shall have been originally issued, before any dividend shall be declared or paid upon or set apart for Preference Stock and/or the Common Stock of the Corporation and before any payments are made to any Sinking Fund created as herein provided for any series of First Preferred Stock and/or Preference Stock. Such dividends shall be cumulative, so that, if in any dividend period or periods dividends shall not have been paid or declared and set apart for payment upon all outstanding First Preferred Stock at the rates determined for the respective series, the deficiency shall be fully paid, or declared and set apart for payment, before any dividends shall be declared or paid upon or set apart for the Preference Stock and/or the Common Stock of the Corporation [fol. 146] and before any payments are made to any Sinking Fund created as herein provided for any series of First Preferred Stock and/or Preference Stock. Dividends shall

not be declared and paid on the First Preferred Stock of any one series for any dividend period unless dividends have been paid or declared and set apart for payment thereof at the same time on the First Preferred Stock of all series, for all the dividend periods terminating on the same or an earlier date.

(2) When full cumulative dividends as aforesaid upon the First Preferred Stock of any series entitled thereto, installments for which periods and for the current dividend periods shall have been paid or declared and set apart for payment, and after complying with all provisions in respect of any sinking fund or funds for the First Preferred Stock of any series entitled thereto, installments for which have been made payable in priority to any dividends on the Preference Stock and the Common Stock of the Corporation, the Board of Directors may, subject to the provisions hereof in respect to the Preference and Common Stock, declare dividends on the Preference Stock and/or the Common Stock of the Corporation, and no holders of any series of the First Preferred Stock as such shall be entitled to share therein.

(3) Upon any dissolution, liquidation or winding up of the Corporation, whether voluntary or involuntary, or upon any reduction of that portion of the capital of the Corporation that has been set up out of the consideration received for any of the shares of the Common Stock of the Corporation, followed presently by the distribution to stockholders of assets of the Corporation which have been constituted surplus by such reduction, the holders of the First Preferred Stock of every series shall be entitled to receive out of the assets of the Corporation One Hundred Dollars ($100.00) per share, plus an amount equal to accrued dividends, before any distribution of the assets to be distributed shall be made to the holders of the Preference and/or Common Stock of the Corporation; but they shall be entitled to no further participation in such distribution. After payment to the holders of the First Preferred Stock of the full preferential amounts hereinbefore provided for, the holders [fol. 147] of the First Preferred Stock as such shall have no right or claim to any of the remaining assets of the Corporation, either upon any distribution of surplus assets or upon dissolution, liquidation or winding up. The re-

maining assets to be distributed, if any, upon a distribution of surplus assets or upon dissolution, liquidation or winding up, shall be distributed among the holders of the Preference Stock and/or the Common Stock of the Corporation. The sale of all the property of the Corporation to, or the merger or consolidation of the Corporation into or with any other corporation shall not be or be deemed to be a distribution of assets or a dissolution, liquidation or winding up for the purposes of this paragraph.

(4) At the option of the Board of Directors of the Corporation, the Corporation may redeem any series of First Preferred Stock determined to be redeemable, or any part of any series, at any time at the redemption price determined for such series; provided, however, that not less than thirty nor more than sixty days previous to the date fixed for redemption a notice of the time and place thereof shall be given to the holders of record of the First Preferred Stock so to be reedemed, by mail or publication, in such manner, as may be prescribed by the By-Laws of the Corporation, or by resolution of the Board of Directors; and provided, further, that in every case of redemption of less than all of the outstanding shares of any one series of First Preferred Stock, the shares of such series to be redeemed shall be chosen by lot in such manner as may be prescribed by resolution of the Board of Directors. At any time after notice of redemption has been given in the manner prescribed by the By-Laws of the Corporation or by resolution of the Board of Directors, the Corporation may deposit, or may cause its nominee to deposit, the aggregate redemption price, with some bank or trust company in the Borough of Manhattan, The City of New York, named in such notice, payable on the date fixed for redemption as aforesaid and in the amounts aforesaid to the respective orders of the holders of the shares so to be redeemed, on endorsement to the Corporation or its nominee, or otherwise, as may be required, and upon surrender of the certificates for such shares. Upon the deposit of said money as aforesaid, or, if no such deposit is made, upon said redemp-
[fol. 148] tion date (unless the Corporation defaults in making payment of the redemption price as set forth in such notice), such holders shall cease to be stockholders with respect to said shares, and from and after the making of said deposit, or, if no such deposit is made, after the re-

demption date (the Corporation not having defaulted in making payment of the redemption price as set forth in such notice), the said holders shall have no interest in or claim against the Corporation, or its nominee, with respect to said shares, but shall be entitled only to receive said monies on the date fixed for redemption as aforesaid from said bank or trust company, or from the Corporation, without interest thereon, upon endorsement, if required, and surrender of the certificates as aforesaid.

If such deposit shall be made by a nominee of the Corporation as aforesaid, such nominee shall upon such deposit become the owner of the shares with respect to which such deposit was made and certificates of stock may be issued to such nominee in evidence of such ownership.

In case the holder of any such First Preferred Stock shall not, within six years after said deposit, claim the amount deposited as above stated for the redemption thereof, the Depositary shall upon demand pay over to the Company such amounts so deposited and the Depositary shall thereupon be relieved from all responsibility to the holder thereof.

Nothing herein contained shall limit any legal right of the Corporation to purchase any shares of the First Preferred Stock.

(5) At all meetings of the stockholders of the Corporation the holders of the First Preferred Stock shall be entitled to one vote for each share of such First Preferred Stock held by them respectively.

(6) The term "accrued dividends" and "dividends accrued and in arrears" shall be deemed to mean in respect of any share of the First Preferred Stock of any series, as of any given date, the amount, if any, by which the product of the rate of dividend per annum, determined upon the shares of such series, multiplied by the number of years and/or parts thereof which shall have elapsed from the date after which dividends on such stock became cumulative to such given date exceeds the total dividends actually [fol. 149] paid on such stock and/or declared and set apart for payment. Accumulations of dividends shall not bear interest.

Preference Stock

(A) The Preference Stock of the Corporation may be issued in one or more series as may be determined from time to time by the Board of Directors, each of such series to be distinctly designated. All shares of any one series of Preference Stock shall be alike in every particular and all series hereafter created shall rank equally and be identical in all respects except as hereinafter in paragraphs (1) to (5) inclusive in this Clause (A) set forth:

(1) The dividend rate on the Preference Stock of each series shall be such rate as may be determined by the Board of Directors of the Corporation in the resolutions providing for the issuance of the Preference Stock of such series and as shall be stated in the certificates of stock therefor.

(2) The Preference Stock of any series may, but need not be, made redeemable at the option of the Corporation at such price (not less than Fifty Dollars ($50.00) nor more than Sixty Dollars ($60.00) per share plus in each case an amount equal to all cumulative dividends on such share both accrued up to the date fixed for redemption whether or not the same shall have been declared or earned, and in arrears) as may be determined by the Board of Directors in the resolutions providing for the issuance of the Preference Stock of such series and as shall be stated in the certificates of stock therefor.

(3) The dates on which dividends, if declared, shall be payable in the case of Preference Stock of each series, shall be such dates as may be fixed by the Board of Directors in the resolutions providing for the issuance of the Preference Stock of such series and as shall be stated in the certificates of stock therefor. The periods between such dates, commencing on such dates, are herein designated as "dividend periods".

(4) The Board of Directors may, in connection with the issue of any series of Preference Stock, provide for a Sinking Fund for the Preference Stock of such series, instalments for which may be made payable in priority to any dividends upon the Common Stock of the Corporation, to [fol. 150] to be applied to the purchase or redemption of the shares of such series, the terms and provisions govern-

ing the operation of any such Sinking Fund to be as determined by the Board of Directors in the resolutions providing for the issuance of the Preference Stock of such series and as shall be stated in the certificates of stock therefor. The Preference Stock retired by the operation of any such Sinking Fund shall not be reissued.

(5) The Board of Directors may, in connection with the issue of any series of Preference Stock, provide that the shares of such series may be convertible into or exchangeable for, shares of any other class or classes or of any other series of the same or of any other class or classes of stock of this Corporation, at such conversion price or prices or at such rates of exchange and with such adjustments as shall be stated and expressed by the Board of Directors in the resolutions providing for the issuance of the Preference Stock of such series and as shall be stated in the certificates of stock therefor.

(B) The following provisions shall apply to all the Preference Stock of the Corporation, irrespective of any variations between the Preference Stock of the different series:

(1) The holders of the Preference Stock of each series shall be entitled to receive dividends payable on such dates as may be determined for such series, when and as declared by the Board of Directors, at the rates determined for the respective series, from the first day of the current dividend period within which such stock shall have been originally issued, before any dividends shall be declared or paid upon or set apart for the Common Stock of the Corporation and before any payments are made to any Sinking Fund created as herein provided for any series of Preference Stock. Such dividends shall be cumulative, so that, if in any dividend period or periods dividends shall not have been paid or declared and set apart for payment upon all outstanding Preference Stock at the rates determined for the respective series, the deficiency shall be fully paid, or declared and set apart for payment, before any dividends shall be declared or paid upon or set apart for the Common Stock of the Corporation and before any payments are made to any Sinking Fund created as herein provided for any series of Preference Stock. Dividends shall not [fol. 151] be declared and paid on the Preference Stock of any one series for any dividend period unless dividends

have been paid or declared and set apart for payment thereof at the same time on the Preference Stock of all series, for all the dividend periods terminating on the same or an earlier date.

(2) When full cumulative dividends as aforesaid upon the Preference Stock of all series then outstanding for all past dividend periods and for the current dividend periods shall have been paid or declared and set apart for payment, and after complying with all provisions in respect of any sinking fund or funds for the Preference Stock of any series entitled thereto, installments for which have been made payable in priority to any dividends on the Common Stock of the Corporation, the Board of Directors may declare dividends on the Common Stock of the Corporation, and no holders of any series of the Preference Stock as such shall be entitled to share therein.

(3) Upon any dissolution, liquidation or winding up of the Corporation, whether voluntary or involuntary, or upon any reduction of that portion of the capital of the Corporation that has been set up out of the consideration received for any of the shares of the Common Stock of the Corporation, followed presently by the distribution to stockholders of assets of the Corporation which have been constituted surplus by such reduction the holders of the Preference Stock of every series shall be entitled to receive out of the assets of the Corporation Fifty Dollars ($50) per share, plus an amount equal to accrued dividends, before any distribution of the assets to be distributed shall be made to the holders of Common Stock of the Corporation; but they shall be entitled to no further participation in such distribution. After payment to the holders of the Preference Stock of the full preferential amounts hereinbefore provided for, the holders of the Preference Stock as such shall have no right or claim to any of the remaining assets of the Corporation, either upon any distribution of surplus assets or upon dissolution, liquidation or winding up. The remaining assets to be distributed, if any, upon a distribution of surplus assets or upon dissolution, liquidation or winding up, shall be distributed among the holders of the Common Stock of the Corporation. The sale of all [fol. 152] the property of the Corporation to, or the merger or consolidation of the Corporation into or with, any other

Corporation shall not be or be deemed to be a distribution of assets, or a dissolution, liquidation or winding up for the purposes of this paragraph.

(4) At the option of the Board of Directors of the Corporation, the Corporation may redeem any series of Preference Stock determined to be redeemable, or any part of any series, at any time at the redemption price determined for such series; provided, however, that not less than thirty nor more than sixty days previous to the date fixed for redemption a notice of the time and place thereof shall be given to the holders of record of the Preference Stock so to be redeemed, by mail or publication, in such manner as may be prescribed by the By-Laws of the Corporation, or by resolution of the Board of Directors; and provided, further, that in every case of redemption of less than all of the outstanding shares of any one series of Preference Stock, the shares of such series to be redeemed shall be chosen by lot in such manner as may be prescribed by resolution of the Board of Directors. At any time after notice of redemption has been given in the manner prescribed by the By-Laws of the Corporation or by resolution of the Board of Directors, the Corporation may deposit, or may cause its nominee to deposit, the aggregate redemption price, with some bank or trust company in the Borough of Manhattan, The City of New York, named in such notice, payable on the date fixed for redemption as aforesaid and in the amounts aforesaid to the respective orders of the holders of the shares so to be redeemed, on endorsement to the Corporation or its nominee, or otherwise, as may be required, and upon surrender of the certificates for such shares. Upon the deposit of said money as aforesaid, or, if no such deposit is made, upon said redemption date (unless the Corporation defaults in making payment of the redemption price as set forth in such notice), such holders shall cease to be stockholders with respect to such shares, and from and after the making of said deposit, or, if no such deposit is made, after the redemption date (the Corporation not having defaulted in making payment of the redemption price as set forth in such notice), the said holders shall have no interest in or claim against the Cor- [fol. 153] poration, or its nominee, with respect to said shares, but shall be entitled only to receive said monies on the date fixed for redemption as aforesaid from said bank

or trust company, or from the Corporation, without interest thereon, upon endorsement, if required, and surrender of the certificates as aforesaid.

If such deposit shall be made by a nominee of the Corporation as aforesaid, such nominee shall upon such deposit become the owner of the shares with respect to which such deposit was made and certificates of stock may be issued to such nominee in evidence of such ownership.

In case the holder of any such Preference Stock shall not, within six years after said deposit, claim the amount deposited as above stated for the redemption thereof, the Depositary shall upon demand pay over to the Company such amounts so deposited and the Depositary shall thereupon be relieved from all responsibility to the holder thereof.

Nothing herein contained shall limit any legal right of the Corporation to purchase any shares of the Preference Stock.

(5) At all meetings of the stockholders of the Corporation the holders of the Preference Stock shall be entitled to one vote for each share of such Preference Stock held by them respectively.

(6) The term "accrued dividends" and "dividends accrued and in arrears" shall be deemed to mean in respect of any share of the Preference Stock of any series, as of any given date, the amount, if any, by which the product of the rate of dividend per annum, determined upon the shares of such series, multiplied by the number of years and/or parts thereof which shall have elapsed from the date after which dividends on such stock became cumulative to such given date exceeds the total dividends actually paid on such stock and/or declared and set apart for payment. Accumulations of dividends shall not bear interest.

Common Stock

None of the shares of the Common Stock shall be entitled to any preferences and each share of Common Stock shall be equal to every other share of said stock in every respect.

[fol. 154] Dividends:

Out of any assets of this Corporation available for dividends remaining after full cumulative dividends on all stock

having priority over the Common Stock shall have been paid or declared or set aside for payment and after complying with all provisions in respect of any sinking fund or funds for the First Preferred Stock and/or Preference Stock and after making such provision, if any, as the Board of Directors may deem necessary or advisable for working capital and reserves, then, and not otherwise, dividends may be paid upon the Common Stock but only when and as determined by the Board of Directors.

Distribution of Assets:

In the event of any liquidation, dissolution or winding up of this Corporation or any other proceeding resulting in any distribution of its assets to its stockholders, after there have been paid to or set aside for the holders of all stock having priority over the Common Stock the full preferential amounts to which they are respectively entitled, the holders of the Common Stock shall be entitled to receive pro rata all of the remaining assets of this Corporation available for distribution to its stockholders. The Board of Directors, by vote of a majority of the members thereof, may distribute in kind to the holders of the Common Stock such remaining assets of this Corporation, or may sell, transfer or otherwise dispose of all of the remaining property or assets of this Corporation to any other corporation and receive payment therefor wholly or partly in cash and/or in stock and/or in obligations of such corporation, and may sell all or any of the consideration received therefor and distribute the balance thereof in kind to the holders of the Common Stock.

Voting Power:

At all meetings of the stockholders of the Corporation the holders of the Common Stock shall be entitled to one vote for each share of such Common Stock held by them respectively.

[fol. 155] Option Warrants

The Board of Directors shall have power at any time or from time to time (without any action by the stockholders of this Corporation) in the name and on behalf of this Corporation to grant rights or options to run for any period of time, including an unlimited period of time, to purchase

from this Corporation any shares of its stock of any class or classes for any consideration (not less than par if such shares have par value) and upon any terms and conditions and to create and issue warrants or other instruments representing such rights or options in any form; all as the Board of Directors may, in its sole discretion, determine.

General Provisions

Consideration Receivable for No Par Value Stock:

Shares of Capital Stock of this Corporation without nominal or par value of any class or classes, hereby or hereafter authorized, may be issued by this Corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors. Said Board shall have authority, as provided by Statute, to determine that only a part of the consideration, which shall be received by this Corporation for any of the shares of its Capital Stock which it shall issue from time to time, shall be capital.

Amount of Capital with Which to Commence Business:

The amount of capital with which the Corporation shall commence business is ten (10) shares of said Common Stock without nominal or par value.

Fifth. The names and places of residence of each of the original subscribers to the capital stock of the Corporation and the number of shares of Common Stock subscribed for by each are as follows:

Name	Place of Residence	Number of Shares
A. V. Lane	Wilmington, Delaware	3
C. S. Peabbles	Wilmington, Delaware	3
L. E. Gray	Wilmington, Delaware	4

Sixth. The Corporation is to have perpetual existence.

Seventh. The private property of the stockholders of the [fol. 156] Corporation shall not be subject to the payment of corporate debts to any extent whatever.

Eighth. The number of directors of the Corporation shall be fixed by the By-Laws, and may be altered from time to time by amendment of such By-Laws, adopted by the Board

of Directors or by the stockholders in the manner provided therein, but such number shall never be less than five. Vacancies caused by an increase in the number of Directors or otherwise may be filled by the Board of Directors in the manner provided in the By-Laws. Directors need not be stockholders. Any director may be removed at any time with or without cause upon the affirmative vote of the holders of a majority of the stock of the Corporation at that time entitled to vote for directors.

Ninth. The following additional provisions are inserted for the regulation of the busines and for the conduct of the affairs of this Corporation and its directors and stockholders:

(1) The Board of Directors shall have power from time to time to fix and determine and to vary the amount to be reserved as a working capital of the Corporation and, before the payment of any dividends or making any distribution of profits, it may set aside out of the net profits of the Corporation such sum or sums as it may from time to time in its absolute discretion think proper whether as a reserve fund to meet contingencies or for the equalizing of dividends or for repairing or maintaining any property of the Corporation or for such corporate purposes as the Board shall think conducive to the interests of the Corporation, subject only to such limitations as the By-Laws of the Corporation may from time to time impose.

(2) In the absence of fraud no contract or other transaction between this Corporation and any other corporation shall be affected by the fact that directors of this Corporation are directors of such other corporation, if such contract or transaction shall be approved or ratified by the affirmative vote of a majority of the directors present at a meeting of the Board of Directors or the Committee of this Corporation having authority in the premises, who are not so interested. Any director individually, or any firm of which any director is a partner, may be a party to or may be in- [fol. 157] terested in any contract or transaction of this Corporation provided that such contract or transaction shall be approved or ratified by the affirmative vote of at least a majority of the directors present at a meeting of the Board of Directors or the Committee of the Corporation having authority in the premises, who are not so interested. Nor

shall any Director be liable to account to this Corporation for any profit realized by him from or through any such transaction or contract of this Corporation, ratified or approved as aforesaid, by reason of his interest in such transaction or contract. Directors so interested may be counted when present at meetings of the Board of Directors or of such committee for the purpose of determining the existence of a quorum. Any director whose interest in any such contract or transaction arises solely by reason of the fact that he is a stockholder, officer or creditor of such other company (or solely by reason of the fact that he is a director of such other company or partner in such firm where such dealing, contract or arrangement is made by officers or employees of the corporation or firm in the ordinary performance of their duties and without the actual participation of such director) shall not be deemed interested in such contract or transaction under any of the provisions of this paragraph, nor shall any contract or transaction be void or voidable because of such interest, nor shall any such director be liable to account because of such interest, nor need any such interest be disclosed. Any contract or act that shall be approved or ratified by the vote of the holders of a majority of the capital stock of the Corporation having voting powers which is represented in person or by proxy at any annual meeting of stockholders or at any special meeting called for the purpose, among others, of considering the approval or ratification of the acts of officers and/or directors (provided that a lawful quorum of stockholders be there represented in person or by proxy) shall be as valid and as binding upon the Corporation and upon all its stockholders as though it had been approved or ratified by every stockholder of the Corporation.

(3) The Board of Directors shall also have power without the assent or vote of the stockholders to make, alter, amend and repeal the By-Laws of the Corporation; to fix the times for the declaration and payment of dividends; to authorize [fol. 158] and cause to be executed and delivered mortgages on and instruments of pledge, or any other instruments creating liens on the real and personal property of the Corporation; to fix from time to time the consideration for which stock of the Corporation without nominal or par value may be issued and to determine what part of such consideration shall be capital; to make and determine the use

and disposition of any surplus or net profits over and above the capital stock paid in, and in its discretion the Board of Directors may use and apply any such surplus or accumulated profits in purchasing or acquiring shares of its own capital stock to such extent and in such manner and upon such terms as the Board of Directors shall deem expedient; the shares of such capital stock so purchased or acquired may be resold unless such shares shall have been retired for the purpose of decreasing the Corporation's capital stock as provided by law.

(4) Subject to direction by resolution of a majority of the stockholders the Board of Directors shall have power from time to time to determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the Corporation (other than the stock ledger) or any of them, shall be open to the inspection of stockholders; and no stockholder shall have any right to inspect any account or book or document of the Corporation except as conferred by statute or authorized by the directors or by a resolution of the stockholders.

(5) The Board of Directors shall have the power to appoint an Executive Committee from among their number, which Committee, to the extent and in the manner provided in the By-Laws of the Corporation, shall have and may exercise all of the powers of the Board of Directors, so far as may be permitted by law, in the management of the business and affairs of the Corporation whenever the Board of Directors is not in session. The fact that the Executive Committee has acted shall be conclusive evidence that the Board of Directors was not in session at the time of such action.

(6) The Board of Directors, in addition to the powers and authority expressly conferred upon it hereinbefore and by statute and by the By-Laws, is hereby empowered to exercise all such powers as may be exercised by the Corpo- [fol. 159] ration; subject, nevertheless, to the provisions of the statutes of the State of Delaware, of this Certificate of Incorporation and to any regulations that may from time to time be made by the stockholders, provided that no regulation so made shall invalidate any provision of this Certificate of Incorporation or any prior act of the directors

which would have continued valid if such regulation had not been made.

Tenth. Whenever a compromise or arrangement is proposed between this Corporation and its creditors or any class of them and/or between this Corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this Corporation or of any creditor or stockholder thereof, or on the application of any receiver or receivers appointed for this Corporation under the provisions of Section 3883 of the Revised Code of 1915 of said State, or on the application of trustees in dissolution or of any receiver or receivers appointed for this Corporation under the provisions of Section 43 of this Chapter, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, to be summoned in such manner as the said Court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this Corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this Corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said organization shall, if sanctioned by the Court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this Corporation, as the case may be, and also on this Corporation.

Eleventh. The Corporation reserves the right to increase or decrease its authorized capital stock, or any class or series thereof, or to reclassify the same, and to amend, alter, change or repeal any provision contained in the Certificate of Incorporation under which the Corporation is organized or in any amendment thereto, in the manner now or hereafter prescribed by law, and all rights conferred upon stockholders in said Certificate of Incorporation or any amend- [fol. 160] ment thereto are granted subject to this reservation; provided, however, that the Corporation shall not decrease the amounts which any class or series of First Preferred Stock and/or Preference Stock shall be entitled to receive as dividends or upon distribution of assets in prefer-

ence to any other class, or decrease the redemption price of such class or series, unless the holders of all the First Preferred Stock and/or Preference Stock of such class or series so affected adversely shall consent thereto.

Twelfth. No stockholder shall be entitled as a matter of right to subscribe for, purchase or receive any shares of the stock or option warrants of the Corporation which it may issue or sell, whether out of the number of shares authorized by this Certificate of Incorporation or by amendment thereof or out of the shares of the stock of the Corporation acquired by it after the issuance thereof; nor shall any stockholder be entitled as a matter of right to purchase or subscribe for or receive any bonds, debentures or other obligations which the Corporation may issue or sell that shall be convertible into or exchangeable for stock or to which shall be attached or appertain any warrant or warrants or other instrument or instruments that shall confer upon the holder or owner of such obligation the right to subscribe for or purchase from the Corporation any shares of its Capital Stock. But all such additional issues of stock, option warrants, or of bonds, debentures or other obligations convertible into or exchangeable for stock or to which warrants shall be attached or appertain or which shall confer upon the holder the right to subscribe for or purchase any shares of stock may be issued and disposed of by the Board of Directors to such persons and upon such terms as in their absolute discretion they may deem advisable.

In witness whereof, we, the undersigned, being all the original subscribers to the capital stock of said Corporation and having respectively agreed to take the shares of such stock stated in Article Fifth of this Certificate of Incorporation, have hereunto set our respective hands and seals this 7th day of January, 1929.

A. V. Lane. (L. S.) C. S. Peabbles. (L. S.) L. E. Gray. (L. S.)

Witness: Albert L. Miller.

[fol. 161] STATE OF DELAWARE,
County of New Castle, ss:

Be it remembered that on this 7th day of January A. D. 1929, personally came before me, Albert L. Miller, a Notary

Public in and for the County and State aforesaid, A. V. Lane, C. S. Peabbles and L. E. Gray parties to the foregoing Certificate of Incorporation, known to me personally to be such, and I having first made known to them and each of them the contents of said Certificate, they did each severally acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, and each deposed that the facts therein stated were truly set forth.

Given under my hand and seal of office the day and year aforesaid.

Albert L. Miller, Notary Public. (Notary Seal.)

STATE OF DELAWARE,
Office of Secretary of State:

I, Charles H. Grantland, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Incorporation of "The United Corporation", as received and filed in this office the seventh day of January, A. D. 1929, at 3 o'clock p. m.

In testimony whereof, I have hereunto set my hand and official seal, at Dover, this seventh day of January in the year of our Lord one thousand nine hundred and twenty-nine.

Charles H. Grantland, Secretary of State. (Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

BRADLEY W. PALMER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 62652. Promulgated April 30, 1935

1. In 1929 the petitioner received rights on shares of stock in two corporations, which he had held for more than [fol. 162] two years, entitling him to purchase additional shares of stock in such corporations. He sold the rights and in his income tax return reported the net proceeds as income taxable as capital net gain. Held, that the net proceeds are taxable as capital net gain.

2. In 1929 the petitioner received rights on shares of stock of the American Superpower Corporation entitling him to purchase shares of stock in other corporations owned by the American Superpower Corporation. The rights thus received had a large market value. The petitioner exercised the rights and purchased the shares of stock offered him. Held, that the petitioner realized no taxable income from the receipt of the rights or from the exercise thereof.

A. Mitchell Palmer, Esq., William D. Harris, Esq., and Francis V. Barstow, Esq., for the petitioner.

F. R. Shearer, Esq., and E. L. Updike, Esq., for the respondent.

OPINION

SMITH:

This is a proceeding for the redetermination of a deficiency in income tax for 1929 in the amount of $33,381.03. The allegations of error stated in the petition are as follows:

(a) The Commissioner erroneously disallowed as a capital net gain the amount received from the sale of stock rights received in respect of stock held by him more than two years, because the Petitioner included in his return the entire proceeds from the sale of the said rights and did not prorate the cost of the basic stock between the said stock and the said rights.

(b) The Commissioner erred in adding to the amount of taxable dividends reported by the Petitioner the sum of $160,115.50 on account of the issue to him by The American Superpower Corporation of Purchase Certificates or rights to purchase shares in The United Corporation and of The Commonwealth & Southern Corporation.

(c) The Commissioner elso erred in adding to the amount of taxable dividends reported by the petitioner the [fol. 163] sum of $135,115.50 on account of the issue to the petitioner by the American Superpower Corporation of Purchase Certificates or rights to purchase shares of The United Corporation.

In his answer the respondent—

* * * avers that in the event it be held and determined that the Commissioner did err in any respect as set forth in subparagraphs (b) and (c) of paragraph IV of the amended petition, then the Commissioner further erred in favor of the petitioner in the following respects:

(1) If said transactions did not represent corporate distributions, the Commissioner erred by overstating the cost or other basis to the petitioner of the stock of The United Corporation so acquired, and thereby understated the correct profit from the sale of 3,800 rights issued to the petitioner by The United Corporation subsequent to the transactions in question.

(2) If said transactions represented distributions, but the Commissioner erred in selecting the proper dates for valuing such distributions, then the Commissioner erred through understating the amount of petitioner's taxable dividends from those sources to the extent that the fair market value of such rights on dates other than those selected by the Commissioner exceeded the respective amounts determined by the Commissioner.

(3) If said transactions represented distributions, but the amounts thereof as determined by the Commissioner exceeded the accumulated earnings and profits of The American Superpower Corporation, then the Commissioner erred through failing to apply the provisions of subdivision (d) of Sec. 115 of the Revenue Act of 1928.

(4) If said transactions pertaining to stock of The United Corporation represented distributions governed by the provisions of Sec. 112 (g) of the Revenue Act of 1928, then the Commissioner erred through failing to apply the provisions of Sec. 113 (a) (9) of that Act to petitioner's holdings of Superpower and United stock, and particularly in overstating the basis of 100 shares of Superpower stock [fol. 164] and 3,800 United rights sold by petitioner later in the year 1929.

The respondent has accordingly moved to increase the deficiency, if any, which may arise from a redetermination of the tax liability in accordance with the Board's opinion.

The material facts have all been stipulated.

1. The petitioner as a stockholder of International Telephone & Telegraph Co. and of Electric Bond & Share Co. received from those corporations during 1929 rights to subscribe to additional shares of their stock. He sold such rights for $27,360 and reported the entire proceeds as income pursuant to the option contained in article 58 of Regulations 74, which, so far as pertinent, provides:

> The taxpayer may at his option include the entire proceeds from the sale of stock rights in gross income, in which case the basis for determining gain or loss from the subsequent sale of the stock in respect of which the rights were issued shall be the same as though the rights had not been issued.

The respondent treated the entire sum as ordinary income, stating in his deficiency notice that "inasmuch as the cost of the basic stock was not prorated, the total selling price should be taxed at ordinary rates". The petitioner had held the shares of stock in respect of which the rights were issued for more than two years prior to the respective dates on which the rights were sold, and claims that the amount of $27,360 is a capital gain under section 101 of the Revenue Act of 1928.

Section 101 of the Revenue Act of 1928 deals with "capital net gains and losses". It defines a "capital gain" as the "taxable gain from the sale or exchange of capital assets consummated after December 31, 1921", and "capital assets" as "property held by the taxpayer for more than two years". The stipulated facts here show that the shares of stock in respect of which the rights in question were issued were owned and held by the petitioner for a period of more than two years at the date the rights were issued. Therefore, they constituted capital assets.

[fol. 165] Were the rights issued on those shares of stock and received by the petitioner likewise capital assets?

In Miles v. Safe Deposit & Trust Co. of Baltimore, 259 U. S. 247, a stock subscription right was regarded as representative of a portion of the stockholder's original investment in the corporate enterprise. The Court stated:

> The stockholder's right to take his part of the new shares therefore—assuming their intrinsic value to have exceeded the issuing price—was essentially analogous to a stock dividend. * * *

In General Counsel Memorandum 12942, Cumulative Bulletin XIII-1, page 73, it was stated:

* * * where stock rights are sold, in determining the period for which the taxpayer held the property there shall be included the period for which he held the stock in respect of which the rights were issued. That position not only finds support in the theory underlying Miles v. Safe Deposit & Trust Co. of Baltimore, supra, but also in section 101 (c) 8 (C), supra, as the issuance of stock rights may be said to effect (certainly in some, if not in all, cases) a recapitalization of a corporation, and thus the rights may be regarded as securities in the reorganized distributing corporation received without the surrender of the stock in respect of which distributed. In that event tacking is, of course, specifically authorized. However, while these considerations support the treatment of rights as capital assets, they do not justify such treatment of stock acquired through the exercise of rights, unless it is held for the period prescribed by the statute. * * *

In Lee v. Commissioner (C. C. A., 1st Cir.),—Fed. (2d) —Mar. 9, 1935), it was held that the date of acquisition of rights to subscribe to stock dates back to the date of acquisition of the stock and that where the stock was acquired more than two years from the date of the sale of the rights the gain must be treated as capital gain.

We think it clear from the stipulated facts that the issuance of the subscription warrants by the International Telephone & Telegraph Co. and the Electric Bond & Share Co. constituted a division among the stockholders of their [fol. 166] capital interests in the corporations and that they stand on the same footing as stock dividends. See article 501 of Regulations 74. Since the shares of stock in respect of which the stock rights were issued had been held by the petitioner f[illegible] a period of more than two years at the date of sale of the stock rights, the rights themselves constituted "capital assets". The contention of the petitioner that the net proceeds from the sale of the rights here in question amounting to $27,360 is taxable as capital net gain is sustained.

2. The principal question presented by this proceeding is whether the petitioner, a stockholder of the American

Superpower Corporation (hereinafter called Superpower), derived any taxable income from the receipt of certain rights issued by Superpower to its stockholders entitling them to purchase from its shares of common stock in the United Corporation (hereinafter called United), and in the Commonwealth & Southern Corporation (hereinafter called Commonwealth), which were exercised by the petitioner. The respondent contends that the value of these rights received by the petitioner in the form of purchase certificates constituted taxable dividends within the meaning of the Revenue Act of 1928. The facts bearing upon this question are all covered in a lengthy stipulation of facts filed with the Board.

Superpower acquired 2,210,853 shares of common stock, 344,187 shares of $3 cumulative preference stock, and 1,000,000 option warrants (entitling the holder to purchase 1,000,000 shares of common stock at any time, without limit, at $27.50 per share), of United upon its organization in January 1929. United was organized for the purpose of bringing into a common ownership large holdings of public utility companies, principally the Public Service Corporation of New Jersey and United Gas Improvement Co. Superpower, J. P. Morgan & Co., Drexel & Co., and Bonbright & Co., were instrumental in its organization. For the United securities acquired by Superpower, Superpower turned over to United shares of stock of the Public Service Corporation of New Jersey and of the United Gas Improvement Co., and $25 cash. The fair market value of these shares thus contributed to United was $72,480,000 as de- [fol. 167] termined by the respondent. The respondent likewise determined the fair market value of United securities received by Superpower to be the same amount, $72,480,000. He found the fair market value of United common stock received by Superpower to be $25 per share. J. P. Morgan & Co. and Bonbright & Co. each agreed to purchase and did purchase from United 400,000 shares of its common stock for cash at $22.50 per share.

At the time of the organization of United, Superpower contemplated selling a portion of the United common shares to be acquired by it to its stockholders. This was for the purpose of building up its cash position and of creating a wide market for the United stock. As soon as it received United common stock it offered to sell pro rata to the holders of its

class A and class B common stock a one-half share of United common stock for each of its common shares outstanding, at $25 per share.

There proved to be a great demand on the part of the public for United common stock. The first series of rights issued by Superpower to its -tockholders to purchase United common stock at $25 per share was actively dealt in on the New York Curb Exchange and ranged from a low of 11⅝ to a high of 21 from January 1, 1925, to January 15, 1929, when the rights expired. Superpower issued 1,642,944 rights on its 1,642,944 shares of class A and class B common stock, all of which rights were exercised on or before January 15, 1929, and Superpower thus disposed of 821,472 shares of its United common stock.

In May 1929 Superpower again offered to sell prorata to its stockholders United common shares at $30 per share. These rights likewise found a ready sale. Practically all of them were exercised and Superpower disposed of more than 400,000 additional shares of United common stock.

In May or June 1929 Superpower acquired, partly by purchase and partly in a non-taxable exchange, certain shares of common stock of Commonwealth. On June 5, 1929, the directors of Superpower took action in reference to a portion of its holdings in Commonwealth similar to that taken in January and in May with respect to United common stock. By resolutions then adopted the holders of its common stock [fol. 168] of record on June 18, 1929, were granted the right to acquire shares of Commonwealth common stock at $15 per share and at the rate of one share of Commonwealth stock for every 10 shares of Superpower common stock (Superpower common stock having a little earlier been split five for one). These rights were likewise valuable. Under the resolution of June 5, 1929, Superpower issued 8,242,310 rights for the purchase of Commonwealth common stock, of which 8,237,480 were exercised on or before July 2, 1929.

At the beginning of 1929, the petitioner was the owner of 3,796 shares of class A and 2,600 shares of class B common stock of Superpower. During the year 1929 the petitioner received purchase certificates from Superpower as follows:

1. On January 23, 1929, purchase certificates entitling the petitioner to purchase on or before February 15, 1929,

3,198 shares of common stock of United at a price of $25 per share.

2. On May 9, 1929, purchase certificates entitling petitioner to purchase on or before May 24, 1929, 1,599 shares of common stock of United at a price of $30 per share.

3. On June 6, 1929, purchase certificates entitling the petitioner to purchase on or before July 2, 1929, 3,200 shares of common stock of Commonwealth at a price of $15 per share.

On February 15, 1929, the petitioner exercised his option under the first purchase certificates and purchased from Superpower 3,198 shares of United common stock and paid therefor in cash $79,950, or at the rate of $25 per share, concurrently surrendering his first purchase certificates. The cost to Superpower of the 3,198 shares of United common as determined by the respondent was $8.949 plus per share and Superpower received from the sale a profit of $16.05 plus per share, total $51,327.90.

On May 24, 1929, petitioner exercised his option under the second purchase certificates and received from Superpower 1,599 shares of United common stock and paid therefor in cash $47,970, or at the rate of $30 per share, concurrently surrendering his second purchase certificates. Superpower realized a profit from the sale of approximately $20 per share, total $33,578.95.

On July 2, 1929, the petitioner exercised his option under [fol. 169] the third set of purchase certificates and acquired from Superpower 3,200 shares of Commonwealth common, paying therefor in cash $48,000, or at the rate of $15 per share, concurrently surrendering the third set of purchase certificates. Superpower received a profit from the sale of $2,912.

In his income tax return for 1929 the petitioner did not include the receipt of the purchase certificates as income. The respondent has held, however, that the petitioner received taxable dividends represented by the value of the purchase certificates received from Superpower entitling him to purchase shares of common stock of United and Commonwealth at what the respondent contends were bargain prices.

Section 115 of the Revenue Act of 1928 provides in part:

(a) Definition of dividend.—The term "dividend" when used in this title * * * means any distribution made by a corporation to its shareholders, whether in money or in

other property, out of its earnings or profits accumulated after February 28, 1913.

(b) Source of distributions.—For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913, may be distributed exempt from tax, after the earnings and profits accumulated after February 28, 1913, have been distributed, but any such tax-free distribution shall be applied against and reduce the basis of the stock provided in section 113.

(c) Distributions in liquidation.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. * * *

(d) Other distributions from capital.—If any distribution (not in partial or complete liquidation) made by a corporation to its shareholders is not out of increase in value of [fol. 170] property accrued before March 1, 1913, and is not out of earnings or profits, then the amount of such distribution shall be applied against and reduce the basis of the stock provided in section 113, and if in excess of such basis, such excess shall be taxable in the same manner as a gain from the sale or exchange of property. The provisions of this subsection shall also apply to distributions from depletion reserves based on the discovery value of mines.

* * * * * * *

(f) Stock dividends.—A stock dividend shall not be subject to tax.

The stipulated facts negative the idea that Superpower had any intention of distributing to its stockholders any of its earnings or any of its assets by the sale of certain shares of common stock of United and of Commonwealth to its stockholders. The resolutions of the board of directors of Superpower relating to these sales do not refer to them as dividends or as distributions of its assets. In its books of account the sales are treated as sales of assets and not other-

wise. It is stipulated that "on its books of account The American Superpower Corporation made no charge against nor deduction from its profits and loss or earnings account, its earned surplus account, or its paid-in surplus account, in connection with or as a result of the issuance of the 'Purchase Certificates' pursuant to the provisions of the aforesaid resolutions of January 23, 1929, May 1, 1929, and June 5, 1929".

As above indicated, the stipulated facts show that the respondent determined the "total fair market value" of all the securities received by Superpower from United in January 1929 to be $72,480,000. He allocated this value to the three classes of securities received and determined the fair market value of the common shares to be $25 per share. This is the exact price at which Superpower offered the first block of 821,472 shares of common stock of United to its stockholders. No valid argument can be made that Superpower intended to distribute to its stockholders any portion of its assets by selling 821,472 common shares of United to them at a fair market value. Upon the sale of the stock at $25 per share Superpower realized a profit of $16.05 on each share. [fol. 171] That $25 was a fair market price for the stock in January 1929 is further evidenced by the fact that J. P. Morgan & Co. and Bonbright & Co., pursuant to the agreement made between the interested parties, each subscribed for and purchased from United 400,000 shares of its common stock at $22.50 per share.

The stipulated facts do not show the fair market value of United common stock in May 1929, or of Commonwealth common stock in June and July 1929. The sales of United common in May 1929 were made at $30 per share, or at $5 per share more than the price at which the stock was offered to Superpower's stockholders in January. The Commonwealth stock was acquired by Superpower just before it was offered for sale by Superpower to its stockholders. In selling it at $15 per share Superpower made a profit on each share sold.

The decided weight of legal authority is to the effect that where a corporation issues to its stockholders rights to purchase shares of its own stock or of its bonds, or, indeed, to purchase assets owned by it, the stockholders do not receive taxable income either from the receipt of the rights or from

the exercise thereof. In Miles v. Safe Deposit & Trust Co. of Baltimore, supra, the Supreme Court held that the distribution to its stockholders by a corporation of rights entitling them to subscribe for new shares of its own stock "in and of itself constituted no division of any part of the accumulated profits or surplus of the company, or even of its capital", and that the privilege to subscribe to the new stock "of itself was not a fruit of stock ownership in the nature of a profit; nor was it a division of any part of the assets of the company". The court further stated:

* * * What would have happened had defendant in error decided to accept the new shares and pay the issuing price instead of selling the rights is of no consequence; in that event there would have been no realized profit, hence no taxable income. * * *

This Board has held that a stockholder who receives a valuable right for the purchase of bonds of the corporation of which he is a stockholder and exercises the right does not [fol. 172] thereby realize taxable income. T. I. Hare Powel, 27 B. T. A. 55; Robert C. Cooley, 27 B. T. A. 986; affirmed on another issue,—Fed. (2d)—(C. C. A., 1st Cir., Jan. 31, 1935); Edward S. Harkness, 31 B. T. A. 1100. The Board has also held that where a stockholder has received rights to purchase shares of stock in the issuing corporation and those rights became worthless in his hands, the stockholder does not have a legal claim of loss of the value of the rights as of the date of receipt by him. St. Louis Union Trust Co. et al., Co-trustees, 30 B. T. A. 370. It has been held further that, where a stockholder of a corporation receives from the corporation valuable rights to purchase shares of stock subscribed for by such corporation and the stockholder exercises such rights, he does not receive taxable income; J. Kemp Bartlett, 28 B. T. A. 285; affd., Helvering v. Bartlett (C. C. A., 4th Cir.), 71 Fed. (2d) 598; also, that where a corporation gives a stockholder a right to purchase property at less than its market value and such right is exercised by the stockholder, the stockholder has not realized taxable income. Taplin v. Commissioner, 41 Fed. (2d) 454; Commissioner v. Van Vorst, 59 Fed. (2d) 677, affirming George W. Van Vorst, Executor, 22 B. T. A. 632. Cf. Samuel A. Salvage v. Commissioner, — Fed. (2d) — (C. C. A., 2d Cir., Mar. 18, 1935).

Article 51 of Regulations 74, promulgated under the provisions of the Revenue Act of 1928, provides in part:

Where property is sold by a corporation to a shareholder, or by an employer to an employee, for an amount substantially less than its fair market value, such shareholder of the corporation or such employee shall include in gross income the difference between the amount paid for the property and the amount of its fair market value. In computing the gain or loss from the subsequent sale of such property its cost shall be deemed to be its fair market value at the date of acquisition by the shareholder or the employee. This paragraph does not apply, however, to the issuance by a corporation to its shareholders of the right to subscribe to its stock, as to which see article 58.

In Irving D. Rossheim, 31 B. T. A. 857, 865, we stated:

* * * Article 51 is the successor to, and is identical with, [fol. 173] article 31 of Regulations 65 and 69, interpreting corresponding provisions of the 1924 and 1926 Acts, respectively. It should also be noted that article 31 of Regulations 65 and 69 and article 51 of Regulations 74 were first promulgated by the Treasury Department as Treasury Decision 3435, and thereafter appeared as a part of Regulations 65, 69 and 74.

Treasury Decision 3435 has been carefully considered by the courts in Taplin v. Commissioner, 41 Fed. (2d) 454; and Commissioner v. Van Vorst, 59 Fed. (2d) 677; affirming George W. Van Vorst, Executor, 22 B. T. A. 632, and by the Board in the latter case and in James William Everhart, 26 B. T. A. 318. These cases and authorities therein cited adequately support the view that article 51 of Regulations 74 cannot create income where none, in fact, exists when measured by the statutory definition of gross income. * * *

This observation is equally applicable to this proceeding.

In support of his contention that the issuance of the purchase certificates by Superpower constituted a dividend the respondent cites Metcalf's Estate v. Commissioner (C. C. A., 2d Cir.), 32 Fed. (2d) 192, affirming 13 B. T. A. 236. The court stated in that case: "The question presented is whether, by the selling of these rights, the petitioner received taxable income, under section 211 of the

Revenue Act of 1921." In the course of its opinion the court stated:

Thus, where a stockholder receives a distribution of the assets of a corporation in cash or in stock of a different enterprise, such distribution is for taxing purposes a dividend. No sound distinction can be drawn between a distribution of stock of another corporation and one of valuable rights to purchase such stock. Each may be sold at its selling price. The rights this petitioner sold netted $18 per right. They amounted to a distribution of assets of the company of which it was a stockholder, just as much as an actual distribution of stock of the Baltimore & Ohio Railroad by the Union Pacific Company did in the Peabody Case. There was a distribution in specie of a portion of the assets of the Southern Pacific Company. [fol. 174] A distribution of earnings or assets of a corporation is a distribution, whether or not so determined.

The facts in that case were in short that the Southern Pacific Co., which owned valuable oil lands, deemed it expedient to dispose of them. As a means of so doing it organized Pacific Oil Co., to which it transferred the oil lands and cash, and then distributed the stock to its stockholders share for share upon the payment by each stockholder of $15 to reimburse it for advances which it had made to the Pacific Oil Co. This Board and the court held that the distribution of the Pacific Oil Co. stock in such circumstances constituted a distribution of property and that the petitioner realized taxable income from the sale of the rights equal to the net proceeds from the sale.

In Helvering v. Bartlett, supra, the question before the court was whether rights issued by a corporation entitling it to purchase shares of stock in another corporation constituted dividends to the amount of the fair market value of the rights received by the stockholder. The Board held that the taxpayer had realized no taxable profit or dividend because of the allotment to him of the rights in question. The court in its opinion stated:

We think that this holding of the Board was clearly right. We are not dealing with a case where a stockholder who has received rights to purchase stock sells the rights and thus realizes a profit. If the taxpayer here had sold the rights allotted him, the amount received on such sale

would, of course, have been taxable as income. Miles v. Safe Deposit Co., 259 U. S. 247; Metcalf's Estate v. Commissioner (C. C. A. 2nd), 32 Fed. (2d) 192. But he did not sell the rights. He exercised the option which they conferred upon him to purchase stock in the fire company; and he has as yet realized no profit upon this transaction. The rights were nothing but options to purchase stock, and the fact that they were allotted to stockholders of the Guaranty Company did not make them in any sense dividends. An option is but a continuing offer, and, when the offer is accepted, it is merged in the contract which results. We have, then, nothing upon which to predicate an [fol. 175] assessment of the tax but a purchase of stock by the taxpayer; and it is well settled that such a transaction does not give rise to taxable income until a profit is realized by the sale of the stock purchased. The taxing statutes are not based upon the theory that a man can "buy himself rich."

* * * * * * * * *

* * * All that the Guaranty Company did was to to acquire in behalf of its stockholders options to subscribe to stock in the Fire Company and to allot these options to them in accordance with their holdings; and it seems clear that one is not to be taxed as upon income merely because he acquires an option which he might sell for value. * * *

* * * No profit is realized upon a purchase; and the mere according of a right to purchase is not to be treated as a dividend or distribution of assets, unless these are in fact involved and the right to purchase is a mere cloak for a transaction which is essentially something else.

* * * A different situation would, of course, be presented if the Guaranty Company had transferred assets to the Fire Company and a preferential right to purchase stock at less than its real value had been accorded the stockholders of the former; for this would amount to a distribution of assets by the Guaranty Company to the stockholders who exercised the right to purchase. But that was not the situation here, and there is nothing to indicate that the formation of the Fire Company was in any sense a *cloak for the payment of a dividend or the distribution of assets.* (Italics supplied.)

Was the issuance of purchase certificates by Superpower "a cloak for the payment of a dividend"? For reasons set forth above we are of the opinion that it was not.

The normal application of the statute to the facts of this case is that the stockholder derives no taxable income either from the receipt of rights to purchase stock at a fair price or from the exercise of those rights. It is only when the circumstances are such that the issuance of the rights is tantamount to the payment of a dividend or [fol. 176] a distribution of assets in the form of a property dividend that the value of the rights may be regarded as a dividend. See Metcalf's Estate, Supra; Nanaline H. Duke, 18 B. T. A. 374.

If a stockholder receives rights and sells them he may have income from the sale of the rights—not from the receipt of them. If, on the other hand, he exercises the rights and later sells the stock or other assets acquired by the exercise of such rights he has a gain or loss from the sale measured by the difference between the selling price and the cost or other basis to him of the property sold.

Upon the entire record we are of the opinion that the petitioner realized no taxable income from the receipt of the purchase certificates involved in this proceeding or from the exercise of them in the purchase of shares of stock of United and Commonwealth. There is no reason to give to the transaction a different interpretation from that placed upon it by both Superpower and the petitioner. Superpower treated the transaction solely as a sale of a portion of its assets and accounted for the profit realized therefrom. The petitioner likewise treated the transaction as a purchase of shares of stock for cash. If and when he shall sell the shares acquired by him the profit or loss must be predicated upon the basis of the price that he paid for them.

Upon this disposition of the case it is unnecessary to consider the third question presented by this proceeding.

The respondent is entitled to a redetermination of the profit realized by the petitioner from the sale of 100 shares of Superpower common stock and from the sale of 3,800 of United rights. The basis to be used in the computation of taxable profit from the sale of the United rights is that approved by the Supreme Court in Miles v. Safe Deposit & Trust Co. of Baltimore, supra. It was stipulated at the

hearing of this proceeding that those matters could be settled from the stipulated facts under Rule 50.

Reviewed by the Board.

Judgment will be entered under Rule 50.

[fol. 177] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ORDER AMENDING OPINION

For good cause shown, it is—

Ordered that the opinion of the Board in the above-entitled proceeding promulgated April 30, 1935, be modified as follows:

Delete the words "The material facts have all been stipulated" at the middle of page 2 [side folio 164] and substitute therefor the following:

"The material facts have all been stipulated and, together with the exhibits referred to in the stipulation and filed at the hearing, are adopted as our findings by reference."

In the second line from the bottom on page 4 [side folio 167] substitute for the words "As soon as" the words "Soon after".

In the eighth line from the top on page 5 [side folio 167] for the words "January 15, 1929", the following: "February 15, 1929,"

In the ninth line from the bottom on page 5 [side folio 168] substitute for the words "On January 23, 1929, purchase certificates" the following: "On February 1, 1929, purchase certificates."

In the sixth line from the bottom on page 5 [side folio 168] substitute for the words "On May 9, 1929, purchase certificates" the following: "On May 15, 1929, purchase certificates."

On the third line from the bottom of page 5 [side folio 168] substitute for the words "On June 6, 1929, purchase certificates" the following: "On June 24, 1929, purchase certificates."

On page 11 [side folio 176] substitute for the last paragraph of the opinion the following:

"The respondent is entitled to a redetermination of the profit realized by the petitioner from the sale of 3,800 of United stock rights. It was stipulated at the hearing of this proceeding that this matter could be settled from the stipulated facts under Rule 50 of the Board's Rules of Practice."

Charles P. Smith, Member.

Dated June 21, 1935.

[fol. 178] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

SETTLEMENT UNDER RULE 50—Filed July 3, 1935

Comes now the Commissioner of Internal Revenue by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and files herewith, as the basis for the entry of the Board's order of redetermination, a recomputation of the tax liability of the petitioner for the year 1929 which is believed to be in accordance with the report of the Board promulgated April 30, 1935.

This recomputation is submitted without prejudice to the right of the Commissioner to contest the correctness of the Board's decision as provided by statute.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, Attorney for Respondent.

Of Counsel: F. R. Shearer, Special Attorney for the Bureau of Internal Revenue.

Statement

IT:AR:BTA—Recomp. AMK.

In re Bradley W. Palmer, 53 State Street, Boston Massachusetts

B. T. A. Docket: No. 62652. Year: 1929

Income Tax Liability

Year	Income Tax Liability	Income Tax Assessed	Deficiency
1929	$39,279.90	$37,965.46	$1,314.44

Net income, 60-day letter dated February 12, 1932:		
Ordinary net income		$246,525.57
Capital net gain		244,811.00
Total		$491,336.57
Add: 1. Profit on sale of stock rights increased		7,529.46
		$498,866.03
[fol. 179]		
Deduct: 2. Dividends		160,115.50
Net income adjusted		$338,750.53
Less: Capital net gain included		272,171.00
Income subject to surtax		$66,579.53
Less:		
Dividends	$110,509.50	
Personal exemption	1,500.00	112,009.50
Income subject to normal tax		None
Surtax on $66,579.53		$5,478.52
Tax at 12½% on $272,171.00		34,021.38
Total tax		$39,499.90
Less: Earned income credit, limited to 25% of surtax on $30,000.00		220.00
Net tax liability		$39,279.90
Tax previously assessed		37,965.46
Deficiency in tax		$1,314.44

Explanation of Adjustments

1. Profit on the sale of 3,800 rights of the United Corporation recomputed in accordance with stipulation of facts. See page 39 of stipulation and memorandum of General Counsel dated June 18, 1935. See below.

Lot No. 1

Shares acquired pursuant to resolution of January 23, 1929:

	Shares	Basis
Exercised 6,396 rights (cash, 1 for 2 at $25.00)	3,198	$79,950.00
Acquired by purchase	2	95.50
Total	3,200	$80,045.50

Lot No. 2

Shares acquired pursuant to resolution of May 1, 1929:

Exercised 6,396 rights (cash, 1 for 4 at $30.00)	1,599	47,970.00
Acquired by purchase	1	68.25
Total	1,600	$48,038.25

[fol. 180]

Basis allocated to 3,800 rights:

3,200 rights (Lot No. 1), 7.4818% of $80,045.50	$5,988.84
600 rights (Lot No. 2), 7.4818% of $48,038,25 x 600	
1600	1,347.80
Total basis of 3,800 rights	$7,336.64
Sale price of 3,800 rights	$2,397.80
Basis	7,336.64
Profit	$16,061.16
Profit, 60-day letter (see revenue agent's report)	8,531.70
Increase	$7,529.46

2. Value of 44,792 rights of American Superpower Corporation eliminated from dividends in accordance with decision of the United States Board of Tax Appeals promulgated April 30, 1935.

Dividends, 60-day letter	$270,625.00
Less: Amount eliminated	160,115.50
Dividends adjusted	$110,509.50

Profit on the sale of International Telephone and Telegraph Company and Electric Bond and Share Company rights amounting to $27,360.00, taxed as capital gain in accordance with Board decision.

Capital net gain, 60-day letter	$244,811.00
Add: Profit on sales of stock rights previously treated as ordinary income	27,360.00
Capital net gain adjusted	$272,171.00

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

DECISION—Entered July 25, 1935

Pursuant to the opinion of the Board in the above-entitled proceeding promulgated April 30, 1935, the respondent on July 3, 1935, filed a notice of settlement. Hearing was had [fol. 181] thereon on July 24, 1935, at which time there was no appearance for the petitioner and the notice of settlement filed by the respondent was not contested. Wherefore, it is—

Ordered and decided that there is a deficiency in income tax due from the petitioner for 1929 in the amount of $1,314.44.

Eugene Black, Member.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR—Filed October 16, 1935

To the Honorable Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant

Attorney General, and Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and respectfully shows:

I. Jurisdiction

That he, the petitioner on review, is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The respondent on review*, Bradley W. Palmer, is an individual residing at 318 Beacon Street, Boston, Massachusetts, and with mailing address at 53 State Street, Boston, Massachusetts. The taxpayer filed his Federal income tax return for the calendar year 1929 with the United States Collector of Internal Revenue for the District of Massachusetts at Boston, Massachusetts, whose office was and is located within the First Circuit.

This is a proceeding for review by the Circuit Court of Appeals for the First Circuit, pursuant to statute in such cases made and provided, of the action taken by the United States Board of Tax Appeals in its report promulgated April 30, 1935, as modified by its order dated June 21, 1935, and in its decision rendered pursuant to said report and [fol. 182] entered July 25, 1935, redetermining that there is a deficiency in income tax due from the taxpayer for the year 1929 in the amount of only $1,314.44, instead of a deficiency in the amount of $33,381.03 as previously determined by the Commissioner of Internal Revenue.

II. Nature of the Controversy

At the beginning of 1929, taxpayer was the owner of 3,796 shares of Class A and 2,600 shares of Class B common stock of The American Superpower Corporation, a Delaware corporation. On June 10, 1929, he acquired four additional shares of Class A stock, and on or about June 11, 1929, the common stock of the corporation was changed to one class only in the ratio of five shares for one, so that the taxpayer then became the owner of 32,000 shares of new common stock.

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* For convenience, respondent on review may sometimes be referred to herein as "taxpayer".

The American Superpower Corporation * had outstanding on January 26, 1929, 1,642,944 shares of its Class A and Class B stock; on May 8, 1929, 1,643,216 shares of its Class A and Class B stock; and on June 16, 1929, 8,242,310 shares of its new common stock. In January, 1929, as the result of oral agreements entered into as early as January 2, 1929, Superpower acquired certain securities of The United Corporation, including 2,210,853 shares of United common stock. United was organized for the purpose of bringing into a common ownership certain minority holdings of stock of public utility companies, principally the Public Service Corporation of New Jersey and the United Gas Improvement Company, previously owned by a number of individuals, partnerships and corporations. The holdings of Superpower to be acquired by United consisted of 800,000 shares common stock of the Public Service Corporation of New Jersey and 53,000 shares common stock of the United Gas Improvement Company. United was organized on January 7, 1929. The other participants made their contributions directly to United in exchange for common stock and other securities, but Superpower effected the [fol. 183] transfer of the certificates evidencing its ownership of said utility stocks through the medium of a newly organized corporation known as the Public Electric Holding Corporation which, pursuant to a prior written agreement between United and Superpower, was immediately merged into The United Corporation by an agreement of merger and consolidation under the laws of the State of Delaware.

In connection with oral negotiations which preceded the formation of United, there was some discussion with respect to the disposition by Superpower of a part of the United stock to be acquired by it, and at the meeting of the board of directors of Superpower on January 9, 1929, the chairman of the board advised the directors that if the offer of United were accepted and the stock of United were acquired as contemplated, the officers expected at some later date to submit to the board a proposition by which Superpower would dispose of a substantial part of the stock of

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* This company is sometimes referred to herein as "Superpower", The United Corporation as "United" and The Commonwealth and Southern Corporation as "Commonwealth".

United to the holders of common stock of Superpower by offering to said stockholders a right to purchase part of the corporation's holdings of United stock.

A plan for distributing a portion of Superpower's holdings of United common stock to its Class A and Class B stockholders was submitted to and approved by the board of directors of Superpower on January 23, 1929. By resolutions then adopted all holders of Class A and Class B stock, at the close of business on January 26, 1929, were granted the right to acquire shares of such United common stock at $25 per share and at the rate of ½ share of United stock for each share of Class A and Class B stock. The same resolutions approved forms of certificates and fractional certificates to evidence such rights, and authorized arrangements for the preparation and mailing of such certificates and for the transfer and delivery to the stockholders of the requisite number of shares of United stock upon their surrendering the certificates and making the payments as therein provided. The board also approved a form of public announcement which was mailed to the stockholders on January 24, 1929, and in which the stockholders were notified that certificates evidencing said rights would be mailed on or about February 1, 1929. On January 30, 1929, Superpower delivered to the transfer agents for [fol. 184] United the required number of shares of United stock in order to carry out the terms of the aforesaid resolutions, and on January 31, 1929, engraved certificates dated February 1, 1929, were mailed to all Class A and Class B stockholders. The certificate mailed to the taxpayer was received by him by United States mail February 1, 1929, and certified that, as the holder of record on January 26, 1929, of 6,396 shares of Class A and Class B common stock of The American Superpower Corporation, he was entitled to acquire from that corporation on or before February 15, 1929, upon the terms and conditions therein stated, a total of 3,198 shares of common stock of The United Corporation at a price of $25 per share. On February 15, 1929, the taxpayer paid to Superpower or its agents the sum of $79,950, surrendered the certificate which he had received from said corporation, and received 3,198 shares of United common stock. In this connection Superpower issued to its Class A and Class B stockholders 1,642,-

944 rights, all of which were exercised by the stockholders or their assignees on or before February 15, 1929.

On May 1, 1929, similar action was taken by Superpower with respect to additional shares of its holdings of United common stock. By resolutions then adopted its Class A and Class B stockholders, at the close of business on May 8, 1929, were granted the right to acquire United stock at $30 per share and at the rate of one share of United stock for each four shares of Class A and Class B common stock. The stockholders were notified under date of May 2, 1929, and were informed that certificates evidencing such rights would be mailed on or as soon after May 8 as practicable. On May 10, 1929, Superpower delivered to the United transfer agents the requisite number of shares of said stock, and on May 12, 1929, certificates dated May 8, 1929, were mailed to the stockholders. The certificate of respondent on review, which was received by him May 13, 1929, certified that, as the holder of record on May 8, 1929, of 6,396 shares of Class A and Class B common stock of The American Superpower Corporation, he was entitled to acquire from that corporation on or before May 24, 1929, upon the terms and conditions therein stated, a total of 1,599 shares of common stock of The United Corporation at a price of $30 [fol. 185] per share. On May 24, 1929, taxpayer paid to Superpower the sum of $47,970, surrendered the certificate mentioned above, and received from said corporation 1,599 shares of United common stock. In this connection Superpower issued 1,643,216 rights, and of the rights so issued, 1,642,016 were exercised by the stockholders or their assignees on or before May 24, 1929.

In May or June 1929, Superpower acquired, partly by purchase and partly in a nontaxable exchange, certain shares of common stock of The Commonwealth & Southern Corporation. On June 5, 1929, the directors of Superpower took action in reference to a part of its holdings of Commonwealth stock similar to that taken on January 23 and May 1. By resolutions then adopted its common stockholders of record on June 18, 1929, were granted the right to acquire shares of Commonwealth stock at $15 per share and at the rate of one share of Commonwealth stock for each ten shares of Superpower common stock. The common stockholders were so advised under date of June 5, 1929, and informed that certificates evidencing said rights

would be mailed on or about June 22, 1929. The required number of shares were delivered by Superpower to Commonwealth for transfer on June 24, June 27 and July 1, 1929. Certificates dated June 22, 1929, were mailed on June 22 to all Superpower common stockholders of record on June 18, 1929. The certificate of the taxpayer, which he received by mail Monday, June 24, 1929, certified that, as the owner of record on June 18, 1929, of 32,000 shares of Superpower common stock, he was entitled to acquire from that corporation on or before July 2, 1929, upon the terms and conditions therein stated, a total of 3,200 shares of common stock of Commonwealth & Southern Corporation at a price of $15 per share. On July 2, 1929, the taxpayer paid to Superpower or its agents the sum of $48,000, surrendered the above-mentioned certificate, and received from Superpower 3,200 shares of Commonwealth common stock. In this connection Superpower issued 8,242,310 rights, of which 8,237,480 were exercised by the stockholders or their assignees on or before July 2, 1929.

The prices fixed in the corporate resolutions, and in the certificates issued to evidence the rights, were materially [fol. 186] and substantially less than the respective market values of the United and Commonwealth stock. Accordingly, the rights to acquire the stock were valuable. Those issued under the resolutions of January 23, 1929, were dealt in on the New York Curb Exchange from January 25 to February 15, at prices ranging from a low of 11⅝ on January 25 to a high of 19⅝ on January 31, and to a low of 12⅜ on February 15. Those issued under the resolutions of May 1, 1929, were dealt in on the New York Curb Exchange from May 2 to May 23, 1929, at prices ranging from a low of 6⅛ on May 2 to a high of 11⅜ on May 11, and to a low of 7 on May 23. The rights to acquire Commonwealth stock were dealt in on the New York Curb Exchange from June 6, to July 2, 1929, at prices ranging from a low of 11/16 to a high of 1 15/16.

In his Federal income tax return for the year 1929 the taxpayer did not report any income from the receipt of said rights from The American Superpower Corporation. In auditing said return the Commissioner of Internal Revenue found and held that the rights issued by Superpower and evidenced by the aforesaid certificates dated February 1, May 8 and June 22, 1929, as above set forth, representing

the distribution of taxable dividends, and determined the amount of such dividends to be the fair market value of said rights on the respective dates fixed by the corporation for ascertaining the stockholders of record entitled to participate, viz., January 26, 1929, May 8, 1929, and June 18, 1929. The Commissioner further found and determined that on said respective dates each of the rights so issued had a fair market value of $12.50, $8.625 and $.78125, respectively. The Commissioner accordingly included in the taxpayer's gross income as dividends from domestic corporations the sum of $160,115.50, computed as follows:

6,396 rights received by taxpayer under resolutions of January 23, 1929, at $12.50 per right	$79,950.00
6,396 rights received by taxpayer under resolutions of May 1, 1929, at $8.625 per right	55,165.50
32,000 rights received by taxpayer under resolutions of June 5, 1929, at $.78125 per right	25,000.00
Total	$160,115.50.

[fol. 187] In addition to the shares of common stock of The United Corporation acquired by the taxpayer through the exercise of rights as aforesaid, he acquired by purchase two shares of such common stock at a cost of $95.50 and one share at a cost of $68.25, so that he became the owner of 4,800 shares of United common stock. On or about July 10, 1929, The United Corporation issued to the holders of its common stock rights to subscribe to additional shares of its own common stock, the taxpayer receiving 4,800 rights, of which he exercised 1,000 rights and sold 3,800 rights for a total price of $23,397.80. In his return for the year 1929 the taxpayer used a cost or other basis of $6,764 as applicable to said 3,800 rights and reported a profit of $16,633.80. In the audit of the return the Commissioner increased the basis and decreased the profit. $7,529.46 of this adjustment in favor of the taxpayer was due to the inclusion in the basis of an aliquot part of the sum of $135,115.50 included by the Commissioner as dividends on account of the receipt of the Superpower rights to acquire United stock.

The above-mentioned adjustments to income, together with others not now in controversy, resulted in the determination by the Commissioner of Internal Revenue of a deficiency in respect of the taxpayer's Federal income tax liability for the year 1929 in the amount of $33,381.03, of which the taxpayer was duly notified by a deficiency notice mailed February 12, 1932.

On March 9, 1932, the respondent on review filed with the United States Board of Tax Appeals a petition for the redetermination of the aforesaid deficiency. By his amended petition filed pursuant to leave granted March 9, 1934, the taxpayer contended before the Board of Tax Appeals:

(a) That the issuance by The American Superpower Corporation to its stockholders of purchase certificates or rights to acquire shares of United and Commonwealth stock, under the resolutions of January 23, May 1 and June 5, 1929, were not in fact or in law dividends or taxable as such;

(b) That the earned surplus of Superpower was only partly sufficient to cover the amount of such distributions [fol. 188] as determined by the Commissioner, particularly with respect to the rights issued under the resolutions of January 23, 1929; and

(c) That the distributions ordered by Superpower on January 23, and May 1, 1929, with respect to United common stock, were made "in pursuance of a plan of reorganization" and nontaxable under the provisions of Section 112(g) of the Revenue Act of 1928.

By his answer to the amended petition the Commissioner of Internal Revenue denied the errors of law and of fact complained of by the taxpayer, and, among other contentions, presented an alternative issue seeking an upward adjustment in the taxable profit from the sale of 3,800 stock rights of The United Corporation, in the event the Board of Tax Appeals should decide any of the aforesaid contentions in favor of the taxpayer.

The proceeding duly came on for hearing and was submitted to the Board of Tax Appeals on the basis of a written stipulation of facts and certain exhibits referred to therein and filed at the hearing. Under date of April 30, 1935, the Board of Tax Appeals promulgated its report and opinion, which was modified by an order entered June 21, 1935, in which order the aforesaid stipulated facts and ex-

hibits were adopted by reference as the Board's findings. In its report as so modified the Board of Tax Appeals concluded, contrary to the determination and contentions of the Commissioner of Internal Revenue, that the taxpayer realized no taxable income from the issuance and receipt of the Superpower rights to acquire United and Commonwealth stock, but that the transactions should be treated as purchases of stock at the prices set forth in the respective resolutions. Having so disposed of taxpayer's main contention, the Board did not decide the other questions presented by the taxpayer, but allowed the Commissioner's alternative contention with respect to increasing the profit from the disposition of the 3,800 United stock rights. Pursuant thereto the Board rendered its decision, which was entered under date of July 25, 1935, redetermining that there is a deficiency in income tax due from the taxpayer for 1929 in the amount of only $1,314.44.

[fol. 189] III. Assignments of Error

The Commissioner of Internal Revenue, being aggrieved by the action of the United States Board of Tax Appeals and by the determinations and conclusions of law made by the Board, is desirous to obtain a review thereof by the Circuit Court of Appeals for the First Circuit. As reasons for such review he alleges that the United States Board of Tax Appeals committed the following errors:

1. The Board's decision is contrary to law.

2. Statements and conclusions of fact contained in the Board's opinion are contrary to the stipulated facts adopted by the Board as its findings of fact.

3. The Board's conclusions of law and its decision are contrary to the Board's findings of fact.

4. The Board erred in holding that the transactions, whereby The American Superpower Corporation issued to its common stockholders valuable rights to acquire certain of its assets, viz., stock of other corporations, did not constitute the distribution of taxable dividends under Section 115 of the Revenue Act of 1928.

5. The Board erred in holding that said transactions represented merely the purchase by the stockholders or their assignees of part of the assets of The American Superpower Corporation.

6. The Board erred in failing to hold that the respondent on review received from The American Superpower Corporation taxable dividends, as the result of either—

(a) The granting of valuable property rights by the corporate resolutions of The American Superpower Corporation;

(b) The receipt from The American Superpower Corporation of "purchase certificates" evidencing the rights granted by said corporate resolutions; or

(c) The acquisition of shares of United and Commonwealth stock upon the exercise of said "purchase certificates".

7. The Board erred in failing to hold that respondent on review received from The American Superpower Corporation taxable dividends equal to the market value of the aforesaid rights when receivable by respondent on review.

[fol. 190] 8. The Board erred in failing to hold that respondent on review received from The American Superpower Corporation taxable dividends equal to the market value of the aforesaid rights at the time they were respectively received by the respondent on review.

9. The Board erred in eliminating the sum of $160,115.50 (the value of such rights as determined by the Commissioner) from the income subject to surtax of the respondent on review; and erred in failing to add to such income the difference between said sum and the market value of such rigths at the time they were respectively received by the respondent on review.

10. The Board erred in deciding that there is a deficiency in respect of the Federal income tax liability of respondent on review for the year 1929 in the amount of only $1,314.44, and in failing to decide that there is a deficiency for said year in the amount of not less than $31,329.03.

Wherefore, the Commissioner of Internal Revenue petitions that the action taken by the United States Board of Tax Appeals in this proceeding be reviewed by the United States Circuit Court of Appeals for the First Circuit, that a transcript of the record be prepared in accordance with law and the rules of said court and transmitted to the clerk of said court for filing, and that appropriate action be

taken to the end that the errors complained of may be reviewed and corrected by said court.

Frank J. Wideman, Assistant Attorney General.
Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel: F. R. Shearer, Special Attorney, Bureau of Internal Revenue.

[fol. 191] *Duly sworn to by F. R. Shearer. Jurat omitted in printing.*

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed October 31, 1935

To Bradley W. Palmer, 53 State Street, Boston, Massachusetts:

You are hereby notified that the Commissioner of Internal Reveune did, on the sixteenth day of October, 1935, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this twenty-third day of October, 1935.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, Attorney for Petitioner on Review.

Service acknowledged, including copy of petition for review and assignments of error, this twenty-fifth day of October, 1935.

Bradley W. Palmer.

[fol. 192] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed October 31, 1935

To A. Mitchell Palmer, Esq., William D. Harris, Esq., 815 Fifteenth Street, N. W., Washington, D. C.:

You are hereby notified that the Commissioner of Internal Revenue did, on the sixteenth day of October, 1935, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this sixteenth day of October, 1935.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, Attorney for Petitioner on Review.

Service acknowledged, including copy of petition for review and assignments of error, this twenty-fifth day of October, 1935.

A. Mitchell Palmer, W. D. H. William D. Harris.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR RECORD—Filed November 25, 1935

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the First Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the Circuit Court

of Appeals for the First Circuit, heretofore filed by the Commisioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board, viz:

[fol. 193] (a) Amended Petition, filed pursuant to leave granted March 9, 1934.

(b) Answer to Amended Petition, filed April 3, 1934.

(c) Reply to Respondent's Answer, filed April 20, 1934.

(d) Commissioner's Settlement Under Rule 50, filed July 3, 1935, including attached recomputation.

3. Orders, opinion and decision of the Board, viz.:

(a) Opinion promulgated April 30, 1935.

(b) Order dated June 21, 1935, modifying Opinion of April 30, 1935.

(c) Stipulation of Facts, including Exhibits B, C, D, E, F, G and H annexed thereto and Exhibits I and J referred to in paragraphs 25 and 27 of said stipulation and filed at the hearing, which stipulation and exhibits were adopted as the Board's findings by reference.

(d) Decision entered July 25, 1935.

4. Commiss-oner's petition for Review and Assignments of Error, filed October 16, 1935.

5. Notices of Filing Petition for Review (2), with proofs of service endorsed thereon.

6. This praecipe, notice of filing, and proof of service.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, Attorney for Petitioner on Review.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PRAECIPE FOR RECORD—Filed December 3, 1935

To Bradley W. Palmer, 53 State Street, Boston, Massachusetts:

You are hereby notified that the Commissioner of Internal Revenue did, on the twenty-fifth day of November, 1935, file with the Clerk of the United States Board of

Tax Appeals at Washington, D. C., a Praecipe for Record in the above-entitled proceeding. A copy of the Praecipe [fol. 194] for Record is hereto attached and served upon you.

Dated this twenty-fifth day of November 1935.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, Attorney for Petitioner on Review.

Personal service of the above and foregoing notice, together with a copy of the Praecipe for Record mentioned therein, is hereby acknowledged this twenty-ninth day of November, 1935.

Bradley W. Palmer, Respondent on Review.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 195] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT

RECITAL AS TO HEARING

On October 14, 1936, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION OF THE COURT—Filed February 12, 1937

MORTON, J.:

This is a petition by the Commissioner of Internal Revenue to review a decision by the Board of Tax Appeals which was adverse to the government. The tax involved is an additional (or deficiency) assessment of income taxes for the year 1929. The facts are stipulated in great detail. The case was heard by the Board on the stipulation and the documentary exhibits.

The taxpayer, Mr. Palmer, was a shareholder in the American Superpower Corporation. That corporation acquired a large block of the capital stock of the United Corporation. By proper corporate action, it offered this stock for sale to its own stockholders at $25 per share, in the proportion of one share of United to each two shares of Superpower. This offer was made to the stockholders of the Superpower Corporation in the form of "Purchase Certificates" or rights to purchase United stock, two rights being required in order to buy one share of United. The rights had to be exercised by a certain date or they lapsed. They were actively traded in on the New York Curb Exchange at prices which varied from day to day, the lowest being 11⅝ and the highest 21. The cost of a share of United Corporation bought from the Superpower Corporation under them would of course be $15 plus the cost of two rights.

After the sales under this first offer had been completed and that transaction closed, Superpower made to its stockholders in May 1929 a second offer of United stock. This offer was similar to the first, except that the price at which United stock was offered was $30 instead of $25, and 4 rights instead of 2 rights were required to buy a share. Thereafter Superpower made a third offer to it stockholders of a different stock, that of the Commonwealth & Southern Corporation. This offer was similar in principle to [fol. 196] the others, differing as to purchase price, number of rights required, dates, etc. On these later offers rights were issued as on the first offer; and the later rights were traded in on the New York Curb as the others had been; they were freely bought and sold and, until they lapsed, had substantial value. Mr. Palmer sold none of his rights under any of the offers. He exercised them all, paid Superpower the required amounts, and took the stock so purchased.

As to the first offer: The Commissioner held that, as the stock to which the rights related was not stock of the corporation which issued them, and as the rights were salable, the amount for which Mr. Palmer might have sold them,—though he never did so,—constituted income. The Commissioner imposed additional taxes accordingly. The Board of Tax Appeals set aside his action, holding that the price of $25 per share as of January, 1929, was "a fair

market price" for the United stock; that the offer was not intended as a cloak for the payment of a dividend; and that the mere receipt of rights, although they had salable value, did not constitute income.

Two principal questions are involved: (1) Whether the Board's findings of fact were unsupported by any substantial evidence or were based on erroneous rulings of law, and therefore should be set aside, and (2) whether the mere receipt of rights which were not sold but were held and exercised constituted income. The first question calls for a somewhat fuller statement of the facts as they appear in the stipulation and in the Board's findings and of the way in which the Board dealt with the matter.

Several different corporations and firms which owned large amounts of stock in certain public utility corporations formed a plan of bringing their holdings into a common ownership through a holding company. The United Corporation was formed for this purpose on or about 7 January 1929. The persons and corporations interested in its organization transferred to it large blocks of public utility stocks and received in payment therefor shares of the new corporation. The Superpower Corporation was one of the organizers. It turned in shares of utility stocks and received therefor, inter alia, 2,210,853 shares of the common stock of the United Corporation, and also 1,000,000 "option warrants", each of which entitled the holder of it [fol. 197] to purchase from the United Corporation at any time one share of its common stock for $27.50. The management of Superpower, for the purpose of strengthening its cash position and establishing a market for the new United stock, decided to offer to sell part of its United stock to its own stockholders as above stated. The offer was formally made to the stockholders by vote of the directors of Superpower on 23 January 1929, and resulted in the issue of the rights here involved.

The Board said in its opinion:

"The stipulated facts negative the idea that Superpower had any intention of distributing to its stockholders any of its earnings or any of its assets by the sale of certain shares of common stock of United and of Commonwealth to its stockholders. The resolutions of the Board of Directors of Superpower relating to these sales do not refer to them as dividends or as distributions of its assets.

In its books of account the sales are treated as *sales* (italics supplied) of assets and not otherwise. It is stipulated that 'on its books of account The American Superpower Corporation made no charge against nor deduction from its profits and loss or earnings account, its earned surplus account, or its paid-in surplus account, in connection with or as a result of the issuance of the "Purchase Certificates" pursuant to the provisions of the aforesaid resolutions of January 23, 1929, May 1, 1929, and June 5, 1929.'

"As above indicated, the stipulated facts show that the respondent (the Commissioner) determined the 'total fair market value' of all the securities received by Superpower from United in January 1929 to be $72,480,000. He allocated this value to the three classes of securities received and determined the fair market value of the common shares to be $25 per share. This is the exact price at which Superpower offered the first block of 821,472 shares of common stock of United to its stockholders. No valid argument can be made that Superpower *intended to distribute* (italics supplied) to its stockholders any portion of its assets by selling 821,472 common shares of United to them at a fair market value. Upon the sale of the stock at $25 per share Superpower realized a profit of $16.05 on each share.

"That $25 was a fair market price for the stock in January 1929 is further evidenced by the fact that J. P. Morgan & Co. and Bonbright & Co., pursuant to the agreement made between the interested parties, each subscribed for and purchased from United 400,000 shares of its common stock at $22.50 per share."

[fol. 198] A sale of property at its fair market price is obviously not a dividend. On the other hand a distribution of property is a dividend. The Commissioner contends that the stipulated facts show that the United Stock was worth substantially more than $25 per share at the date of the first so-called "sales" of it, and that this excess value constituted a distribution of property by Superpower to its stockholders; that the Board erred in overlooking or disregarding the evidence of value afforded by the sales of rights and of United stock; and that, taking all the facts which appear in the stipulation, the findings of the Board on this point are arbitrary and without substantial

support in the evidence, or rest on a mistake of law. January 26, 1929, May 8, 1929, and June 18, 1929, were the dates of the respective offerings fixed by Superpower for determining the stockholders of record to whom distribution of stock rights should be made, and these were the dates taken by the Commissioner for determining the value of the stock rights under the respective offerings.

The formal rights of "Purchase Certificates" under the first offer were issued by Superpower to stockholders on February 1 and expired on February 15, on which latter date the taxpayer exercised these rights. They were dealt in to a considerable extent before issue. On January 25, two days after the Superpower vote, 11,000 of them were sold on the Curb Exchange at prices ranging from 11⅝ to 12⅜, thereby putting a value of from 48 to 50 on the United stock. On January 28, 44,000 of them were dealt in on that Exchange at prices ranging from 12⅝ to 17½, thereby putting a value of from 50 to 60 on the United stock. On January 29, 30 and 31, Superpower itself sold about 9200 shares of its United stock on the open market at from 50 to 63 per share. The second offering was likewise dealt in on the Curb Exchange from May 2, 1929, to May 24, 1929, and the third one from June 6, 1929, to July 2, 1929. In view of the large number of rights dealt in these prices furnished almost conclusive evidence of the market value of United stock at the time when it was acquired by the taxpayer. The Board completely disregarded them: they are not referred to in its opinion, nor are the grounds on which they are disregarded stated. Apparently the Board held that an intention to make a distribution was essential in order to make the transaction a [fol. 199] dividend. The question is not one of intention but of what was in fact done.

The statute defines dividend. "The term dividend when used is this title * * * means any distribution made by a corporation to its shareholders whether in money or in other property," etc. Rev. Act of 1928, chap. 852, Sec. 115 (a). It says nothing about intention. The transaction is to be judged by the effect of it. Where the matter is doubtful the intention of the parties may well be accepted, especially when the property distributed has not a definitely ascertainable value which can be promptly realized. Here the property distributed was readily salable at about twice

the amount paid for it. For practical purposes it was equivalent to money. We think the excess value of United stock above the price at which Superpower sold it was clearly a dividend. It was so held with reference to this very issue in Ramapo, Inc., v. Commissioner, 84 Fed. (2d) 986 (C. C. A. 2d) July 6, 1936. See Harvard Law Review, January, 1937, page 509, collecting and discussing decision on "bargain sales".

As to the second offer of United stock and the offer of Commonwealth & Southern stock: What has been said as to the first offer of United stock applies more strongly to the second offer, as to which the only reasonable conclusion from the stipulated facts was that the price of $30 per share was very substantially less than the established selling price of it. When Commonwealth & Southern was offered, the rights to purchase it were immediately valuable, selling on the Exchange at prices which nearly doubled the offering price of the stock. By the exercise of his rights, Mr. Palmer acquired stock in each case at substantially less than the market price of it.

We do not think, however, that the rights themselves were taxable income. If sold, the money received on them was a dividend; if exercised, the excess of value of the property acquired over the cash paid for it was a distribution of property and was taxable at its fair market value. The value of the rights is evidence of the excess of value. It may be that other factors should be considered in determining the amount of the dividend. We recognize the difficulties in dealing with property as dividends It is, however, explicitly so provided in the statute. When the dividend is [fol. 200] made in readily salable securities, the difficulties are not very real, the securities can be sold and the dividend converted into cash if the recipient so desires. If he chooses to continue the investment, it stands on the same footing as any other investment and subject to the same chances of depreciation.

The value of the shares of stock should be determined as of the dates when the stock rights were exercised, viz.: under the first offering as of February 15, 1929, under the second offering as of May 24, 1929, and under the third one as of July 2, 1929, for these are the dates on which the taxpayer, in this case, in fact received taxable distributions. The dates taken by the Commissioner for this purpose were not the correct ones.

The decision of the Board of Tax Appeals is vacated and the case is remanded to that Board for further proceedings not inconsistent with his opinion.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION—Filed February 12, 1937

WILSON, J., (dissenting):

In the main I agree as to the facts set forth in the opinion, but not to the conclusion drawn therefrom.

The Commissioner found that a fair market value of the securities transferred by the Superpower Company to the United Corporation, hereinafter referred to as "United," in exchange for 344,187 shares of preferred stock, 2,210,853 shares of common stock, and 1,000,000 option warrants entitled the Superpower Company to purchase 1,000,000 shares of United, was $72,480,000, upon the basis of which the Commissioner found that a fair market value of the common stock was $25 per share.

Superpower then offered to sell 821,472 shares of the common stock of United thus acquired to the stockholders of Superpower at $25 per share. In carrying out the proposal, Superpower issued to its stockholders what it termed "Purchase Certificates", thereby giving to each stockholder of Superpower the right to purchase at $25 per share one share of United for each two purchase certificates issued to him.

I agree with the opinion that the purchase certificates themselves did not represent taxable income, but I do not agree that when sold the amount received represented a [fol. 201] dividend by Superpower, although it represented taxable income. Neither do I agree that, if exercised, the value of the shares of United received in "excess of the amount paid for it in cash was a distribution of property and taxable at its fair market value", and as a dividend. It was a sale at what the Commissioner determined was its fair market value.

A dividend as defined by the 1928 Act, Chap. 852, Sec. 115, is "any distribution made by a corporation to its stockhold-

ers, whether in money or other property *out of the earnings or profits accumulated after February 28, 1913.*" [Italics supplied.] Ordinarily an increase in the market value of stock is not treated as profits until actually realized by sale or exchange.

Neither the purchase certificates nor the shares of United stock were a distribution of property from the earnings of Superpower; nor were the assets of Superpower or its earned surplus decreased by the sale of United stock at $25. In fact, according to the determination of the value of the Superpower securities by the Commissioner, which were exchanged for United stock, the actual value of its assets remained the same, though the book value of its assets were increased, for which Superpower accounted in its tax return for 1929. It was a substitution of an equal amount of cash for the value of each share of United stock as determined by the Commissioner and sold under the options. Neither Superpower nor the taxpayer treated either the purchase certificates or the sale of United stock as a dividend, or as a distribution of property, but as a bona fide sale. The Board of Tax Appeals so found. Even if the United stock proved to have a market value in the boom market of 1929 over and above the cash paid, it could not be realized as income until sold. The Board may well have found that the trading in purchase certificates in such a market was not sufficient grounds for determining the fair market value of United stock. Other elements than sales on the Stock Exchange enter into the determination of a fair market value of stocks. San Francisco National Bank v. Dodge, 197 U. S. 70, 80.

The Ramapo case, 84 Fed. (2d) 986, presents a different state of facts from this case. In that case the taxpayer was a corporation, and both the Commissioner and the taxpayer found it to be for their interests to treat the purchase certificates and sale of United stock as dividends, which they [fol. 202] did. The taxpayer sold a part of its purchase certificates and, of course, was taxable as income for the amount received therefor. It also sold the stock or a part of it acquired by the exercise of the remaining purchase certificates, and the profit gained by it was, of course, taxable. The situation which arises from the facts in this case was not considered by the court except in the form of dicta.

The premises assumed in the Ramapo opinion as a basis for holding that the issuing of the rights was a distribution

of corporate assets, and that if the value of the United stock in excess of the price paid for it in cash represented earnings or surplus was a dividend, do not exist as facts found or stipulated in this case.

This was not a distribution of corporate assets, but a sale at a price found by the Commissioner to represent the fair market value of the United stock. The cash received therefor by Superpower restored to it as assets the proportionate fair market value of the securities exchanged by Superpower for the stock of United.

We are not concerned with what might have resulted if the petitioner had sold the purchase certificates, or had sold the stock acquired after the exercise of his right to purchase. He did neither.

In the Metcalf case cited in the Ramapo opinion, the rights were sold and there was no difficulty in determining the basis for an income tax.

In Helvering v. Bartlett, 71 Fed. (2d) 598, however, the court considered the exact situation which has arisen here and said in its opinion, page 600:

"We think that this holding of the Board was clearly right. We are not dealing with a case where a stockholder who has received rights to purchase stock sells the rights and thus realizes a profit. If the taxpayer here had sold the rights allotted him, the amount received in such sale would, of course, have been taxable as income. Miles v. Safe Deposit & Trust Co., 259 U. S. 247; Metcalf's Estate v. Commissioner (C .C. A. 2d), 32 F. (2d) 192. But he did not sell the rights. He exercised the option which they conferred upon him to purchase stock in the fire company; and he has as yet realized no profit upon this transaction. The rights were nothing but options to purchase stock, and the fact that they were allotted to stockholders of the Guaranty Company [fol. 203] did not make them in any sense dividends. An option is but a continuing offer; and, when the offer is accepted, it is merged in the contract which results. We have, then, nothing upon which to predicate an assessment of the tax but a purchase of stock by the taxpayer; and it is well settled that such a transaction does not give rise to taxable income until a profit is realized by the sale of the stock purchased. The taxing statutes are not based upon the theory that a man can 'buy himself rich'."

In Miles v. Safe Deposit & Trust Co., 259 U. S. 247, it was held that, where a stockholder sold rights to subscribe to new stock in a corporation, the amount thus realized was taxable as income; but the court pointed out that, if he had decided to accept the new shares instead of selling the rights, there would have been no profit and hence no taxable income. In that case it was the stock of the same corporation; but the court held that the same principle would hold as to the purchase of stock of another corporation. No profit is realized upon a purchase; and the mere right to purchase is not to be treated as a dividend or distribution of assets, unless the right to purchase is a mere cloak for what in fact is a dividend.

There is no evidence that the offering of the stock of the United was intended by Superpower as a cloak for what in fact was a dividend. The Board of Tax Appeals found as a fact that it was not. This court cannot review this finding.

Taxation is a practical matter. The income tax law is concerned, generally speaking, only with realized gains or losses. Lucas v. American Code Company, Inc., 280 U. S. 445, 449; Burnet v. Logan, 283 U. S. 404, 413; Weiss v. Wiener, 279 U. S. 333, 335; United States v. White Dental Manufacturing Company, 274 U. S. 398, 401. No gain is realized by a taxpayer as a result of the allotment to him of rights to purchase, or of a purchase under those rights until the stock acquired is sold. That he might have realized a profit if he had sold the rights is beside the point. Helvering v. Bartlett, supra. Taxes must be imposed on the basis of what happened, not on the basis of what might have happened.

Obviously the taxpayer cannot be taxed as income based on the selling price of the purchase certificates during the [fol. 204] period he held them, since he did not realize income from them. If he failed to exercise them, he could claim no loss. Eastern Shares Corporation v. Commissioner, 32 B. T. A. 608. To him they simply represented a right to buy United stock. When exercised they became merely an acceptance of an offer to sell. If the stock proved to have an increased market value in the boom market of 1929 over the cash paid the company, he has not realized on it. To determine taxable income there must be a sale or exchange of property, or something definite other than a

fluctuating stock exchange market. The court does not recognize theoretical gains or losses.

As the court said in Commissioner v. Cummings, 77 Fed. (2d) 670, 672: "Taxation does not concern itself with hypotheses, but with real situations." Citing Helvering v. Bartlett, supra.

I think the decision of the Board should have been affirmed.

In United States Circuit Court of Appeals

Final Decree—February 12, 1937

This cause came on to be heard October 14, 1936, upon the record on petition for review of the United States Board of Tax Appeals and was argued by counsel.

Upon consideration whereof, it is now, to wit, February 12, 1937, here ordered, adjudged and decreed as follows: The decision of the Board of Tax Appeals is vacated and the case is remanded to that Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

Arthur I. Charron, Clerk.

Recitals as to Stay of Mandate

Thereafter, to wit, on March 9, 1937, mandate was stayed until further order of court.

[fol. 205] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 206] Supreme Court of the United States, October Term, 1937

No. 19

Order Allowing Certiorari—Filed May 17, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified

copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 207] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1937

No. 59

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File Nos. 41,388, 41,526. U. S. Circuit Court of Appeals, First Circuit. Term No. 19. Bradley W. Palmer, petitioner, vs. Commissioner of Internal Revenue. Filed March 31, 1937. Term No. 59. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Bradley W. Palmer. Filed May 12, 1937. Petitions for writs of certiorari and exhibit thereto. Filed March 31, 1937, May 12, 1937. Term Nos. 19, O. T., 1937; 59, O. T., 1937.

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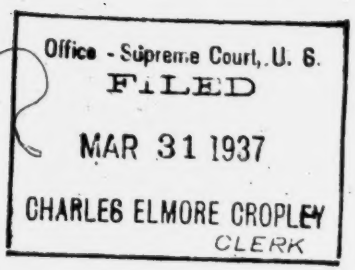

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. [redacted] 19

BRADLEY W. PALMER, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROBERT G. DODGE,
HAROLD S. DAVIS,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1936.

No.

BRADLEY W. PALMER, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:—

Bradley W. Palmer of Boston, Massachusetts, respectfully represents as follows:—

1. During the year 1929 the petitioner was the owner of common stock of The American Superpower Corporation (R. 69, 168).

2. On January 7, 1929, a corporation called The United Corporation was formed in fulfillment of a plan whereby certain securities then held by The American Superpower Corporation were to be exchanged for common and preferred stock of The United Corporation and whereby The American Superpower Corporation was to offer to its stockholders at $25 per share 821,472 shares of the 2,210,853 common shares of The United Corporation stock so received (R. 83-86, 170-171). The object of providing that

shares of The United Corporation stock should thus be sold to stockholders of The American Superpower Corporation was to build up the latter's cash position and to create a wide market for The United Corporation stock (R. 16, 167). For the purpose of the exchange the securities transferred by The American Superpower Corporation to The United Corporation were taken at agreed values substantially equivalent to the market value as of that time (R. 84-86). The Commissioner of Internal Revenue, for the purpose of fixing the tax liability of The American Superpower Corporation for 1929, later determined the aggregate value of the securities received by it to be the same as that of the securities transferred and of this total allocated a sum representing $25 per share to the common stock of The United Corporation (R. 89).

3. In accordance with the plan above described, the directors of The American Superpower Corporation on January 23, 1929, voted to offer to the common stockholders of record January 26, 1929, the privilege of purchasing at $25 per share one half of a share of the above-mentioned stock of The United Corporation for every share of common stock held in The American Superpower Corporation, this privilege to be evidenced by negotiable purchase certificates which should become void unless the privilege of purchase were exercised on or before February 15, 1929 (R. 16-17).

4. On May 1, 1929, and June 5, 1929, respectively, the directors of The American Superpower Corporation voted to give the common shareholders the privilege of purchasing additional stock of The United Corporation at $30 per share and stock of The Commonwealth & Southern Corporation (in the organization of which The American Superpower Corporation had participated in May, 1929) at $15 per share (R. 26-27, 33-35).

5. Pursuant to these votes the petitioner received on February 1, 1929, May 13, 1929, and June 23, 1929, respectively certificates giving him the privilege of purchasing 3,198 shares of The United Corporation at $25 per share, 1,599 shares of The United Corporation at $30 per share and 3,200 shares of The Commonwealth & Southern Corporation at $15 per share (R. 70, 72, 75).

6. On February 15, 1929, the petitioner exercised his option under the first set of purchase certificates and purchased the shares to which these referred, paying for such shares $79,950 (R. 168).

7. On May 24, 1929, the petitioner exercised his option under the second set of purchase certificates and purchased the shares to which these referred, paying for such shares $47,970 (R. 168).

8. On July 2, 1929, the petitioner exercised his option under the third set of purchase certificates and purchased the shares to which these referred, paying for such shares $48,000 (R. 168-169).

9. Each of these sales represented a considerable profit to The American Superpower Corporation over the cost of the property exchanged by it for stock of The United Corporation and of The Commonwealth & Southern Corporation respectively (R. 168-169).

10. The petitioner did not during the year 1929 sell or otherwise dispose of any of the stock purchased by him as aforesaid. Being advised that his receipt of the respective purchase certificates and the purchases made by him thereunder gave rise to no taxable income, he did not include in his return of income for 1929 any item reflecting these transactions (R. 169).

11. The Commissioner ruled in substance that the issue of these certificates constituted dividends and for this purpose were to be valued as of the dates upon which the rights to purchase stock of The United Corporation and of

The Commonwealth & Southern Corporation respectively attached to the stock of The American Superpower Corporation. The Commissioner placed a value on the first set of certificates of $12.50 per share of The American Superpower Corporation stock as of January 26, 1929, on the second set of $8.625 as of May 8, 1929, and on the third set of $.78⅛ as of June 18, 1929. The Commissioner accordingly held that the three issues of rights to the petitioner gave rise to total taxable income of $160,115.50 (R. 8, 61).

12. The Board of Tax Appeals upon the petitioner's application for a redetermination found as an inference from the facts set out in great detail in the stipulation filed by the parties (R. 68-161) that the purpose of offering the stock in question to the stockholders of The American Superpower Corporation was to build up its cash position and create a wide market for The United Corporation stock and not to distribute among the stockholders any of The American Superpower Corporation's earnings or assets (R. 167).

13. The Board further found from all the evidence that the fair market value of The United Corporation stock when offered by The American Superpower Corporation to its stockholders in January, 1929, was not more than $25 per share and held that the evidence did not disclose the fair market value of The United Corporation stock in May, 1929, or of The Commonwealth & Southern Corporation stock on the material dates (R. 170-171).

14. Upon these findings the Board came to the conclusion that the issue of the purchase certificates did not constitute a distribution by the corporation to its shareholders within the meaning of the governing statute,* that "the petitioner realized no taxable income from the re-

* Revenue Act of 1928, §115 (a).

ceipt of the purchase certificates involved in this proceeding or from the exercise of them in the purchase of shares of stock of United and Commonwealth" and that, "if and when he shall sell the shares acquired by him, the profit or loss must be predicated upon the basis of the price that he paid for them" (R. 176).

15. The Commissioner petitioned the Circuit Court of Appeals for the First Circuit to review the decision of the Board, the case being docketed in that court as No. 3100. The majority of the court after hearing rendered an opinion to the effect that "the rights themselves were [not] taxable income," but that "if exercised, the excess of value of the property acquired over the cash paid for it was a distribution of property and was taxable at its fair value" (R. 199). On the strength of the market quotations which were in evidence the majority further held that, notwithstanding the findings of the Board as to the actual value of the stock referred to in the purchase certificates, it had a value substantially in excess of the amounts paid for it and that "the excess value of . . . [the stock] above the price at which Superpower sold it was clearly a dividend," saying that the question was "not one of intention, but of what was in fact done" (R. 199). As to the dates with respect to which the value should be ascertained the majority said (R. 200):—

> "The value of the shares of stock should be determined as of the dates when the stock rights were exercised, viz.: under the first offering as of February 15, 1929, under the second offering as of May 24, 1929, and under the third one as of July 2, 1929, for these are the dates on which the taxpayer, in this case, in fact received taxable distributions. The dates taken by the Commissioner for this purpose were not the correct ones."

16. In a dissenting opinion Judge Wilson said (R. 202-204):—

> "This was not a distribution of corporate assets, but a sale at a price found by the Commissioner to represent the fair market value of the United stock. The cash received therefor by Superpower restored to it as assets the proportionate fair market value of the securities exchanged by Superpower for the stock of United.
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> "We are not concerned with what might have resulted if the petitioner had sold the purchase certificates, or had sold the stock acquired after the exercise of his right to purchase. He did neither.
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> "There is no evidence that the offering of the stock of the United was intended by Superpower as a cloak for what in fact was a dividend. The Board of Tax Appeals found as a fact that it was not. This court cannot review this finding.
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> "Obviously the taxpayer cannot be taxed as income based on the selling price of the purchase certificates during the period he held them, since he did not realize income from them. If he failed to exercise them, he could claim no loss. *Eastern Shares Corporation* v. *Commissioner*, 32 B.T.A. 608. To him they simply represented a right to buy United stock. When exercised they became merely an acceptance of an offer to sell. If the stock proved to have an increased market value in the boom market of 1929 over the cash paid the company, he has not realized on it. To determine taxable income there must be a sale or exchange of property, or something definite other than a fluctuating

stock exchange market. The court does not recognize theoretical gains or losses."

17. In accordance with the opinion of the majority, the Circuit Court of Appeals on February 12, 1937, ordered that the decision of the Board of Tax Appeals be vacated and the case remanded to that Board for further proceedings not inconsistent with the opinion (R. 204). Upon the motion of the petitioner it was subsequently ordered that the issue of the mandate be stayed (R. 204).

18. The decision of the Circuit Court of Appeals presents the following points calling for review by this court:—

(*a*) As to what the result should be if it be assumed that the fair value of the stock purchased by the petitioner was more than the price paid by him to The American Superpower Corporation, the case involves issues upon which the decisions of the different federal tribunals are sharply in conflict.

(*i*) Since the question whether the transactions in question constituted sales or dividends is one of fact, the majority of the Circuit Court of Appeals, in assuming to hold that these transactions were dividends although the Board of Tax Appeals had found upon all the evidence that they constituted sales, acted in disregard of the well-settled rule that findings of fact by the Board are final. The case, therefore, presents the same necessity for intervention by this court as was deemed to exist in the very recent case of *Elmhurst Cemetery Association* v. *Commissioner*, 300 U.S. — (Feb. 1, 1937).

(*ii*) The Circuit Court of Appeals for the Second Circuit in *Ramapo, Inc.*, v. *Commissioner*, 84 F. (2d) 986, and the Circuit Court of Appeals for the Seventh

Circuit in *Commissioner* v. *Mayer*, 86 F. (2d) 593, have held upon states of fact similar to that now presented that the stockholder is taxable as for a dividend, though neither of these courts discussed the intention with which the sales were made or concurred except by inference with the ruling of the majority of the Circuit Court of Appeals for the First Circuit in the case at bar that this intention was immaterial. That ruling is, on the other hand, opposed to the decision of the Circuit Court of Appeals for the Fourth Circuit in *Helvering* v. *Bartlett*, 71 F. (2d) 598, and to that of the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *Cummings*, 77 F. (2d) 670, as well as to other decisions of the various Circuit Courts of Appeals with respect to analogous situations.

(*iii*) The conflict between the various decisions as to the dates as of which the value of the purchase certificates, if material, should be determined reflects fundamental differences of conception as to the nature of the transactions:—

According to the ruling of the Commissioner, it was the attaching of the rights to purchase stock of The United Corporation and of The Commonwealth & Southern Corporation respectively to the stock of The American Superpower Corporation that constituted the payment of dividends; on this view the value of the stock referred to in the purchase certificates should be ascertained with reference to the dates as of which the rights to purchase attached.

According to the ruling of the Circuit Court of Appeals for the Second Circuit in *Ramapo, Inc.*, v. *Commissioner*, 84 F. (2d) 986, it was the receipt of the purchase certificates by the stockholder that amounted to the receipt of a dividend; upon this assumption the amount

of the supposed dividends must be determined as of the dates when the respective certificates were received.

According to the view taken by the majority of the Circuit Court of Appeals for the First Circuit in the case at bar the issue of the certificates did not constitute the payment of a dividend, but the exercise of the rights evidenced by the certificates amounted to the receipt of a dividend; upon the respective dates when the rights were exercised the stockholder on this theory received taxable income in an amount equal to the difference between the amounts paid by him to The American Superpower Corporation for stock of The United Corporation or of The Commonwealth & Southern Corporation, as the case might be, and the values of such stock on those dates.

If the value of the rights is measured by the quotations in the market, the precise date as of which the value is determined is important, because the market quotations varied greatly from day to day.

(*b*) With respect to the value of the stock in question, the majority of the Circuit Court of Appeals likewise failed to follow the rule laid down by this court that findings of fact by the Board of Tax Appeals are final, assuming to disregard the findings made by the Board upon all the evidence and to draw their own inferences as to value from the facts set out in great detail in the stipulation. In this aspect, as in that referred to above, the decision in *Elmhurst Cemetery Association* v. *Commissioner,* 300 U.S. — (Feb. 1, 1937), is directly in point.

19. The questions presented are important not only to the parties, but to the public. The court will take notice of the frequency with which questions arise under the tax

laws as to whether a given transaction constitutes the payment of a dividend and of the fact that, as appears from the many cases both before the Board of Tax Appeals and before the courts involving transactions of this kind and from the lack of harmony in the several decisions, these questions are often of great difficulty. Definitive rulings are much needed for the guidance both of taxpayers and of the taxing authorities.

The petitioner therefore prays that a writ of certiorari issue out of this court to the United States Circuit Court of Appeals for the First Circuit commanding that the said case numbered 3100 be certified to this court for review and determination.

ROBERT G. DODGE,
HAROLD S. DAVIS,
Attorneys for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1936.

No.

BRADLEY W. PALMER, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF FOR THE PETITIONER.

The present petition seeks the review of a decision (R. 204) rendered on February 12, 1937, by the United States Circuit Court of Appeals for the First Circuit whereby that court, upon the application of the Commissioner of Internal Revenue, reversed a decision of the Board of Tax Appeals in favor of the petitioner.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals is reported in 32 B.T.A. 550; the opinions of the majority and minority of the Circuit Court of Appeals are not yet reported, but appear at pages 195 and 200 in the record respectively.

JURISDICTION.

The jurisdiction of this court to review the decision of the Circuit Court of Appeals is invoked under 28 U.S.C.

§347 (a) (Judicial Code, §240, as amended by the Act of February 13, 1925, c. 229, §1, 43 Stat. 938).

Questions Presented.

The petitioner received as a stockholder of The American Superpower Corporation certificates entitling him to buy of that corporation at specified prices shares of stock in other corporations owned by it. The petitioner availed himself of the opportunity afforded by the certificates and purchased the stock to which they related. The Board of Tax Appeals found as a fact (R. 170, 176) that the issue of the certificates and the purchase of stock by virtue of them was a *bona fide* sale and purchase and was not intended to constitute and did not constitute a dividend within the meaning of the governing statute (Revenue Act of 1928, §115a)* which reads as follows:—

> "The term 'dividend' when used in this title . . . means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913."

The Board further found as a fact that the fair market value of the stock in question did not exceed the amount paid by the petitioner for it (R. 170-171).

Briefly stated the questions now presented are,—

(1) Whether, if it be assumed that the value of the stock in question was in excess of the prices paid by the petitioner, it was competent for the Circuit Court of Appeals

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* It may be noted that this provision is repeated without change in each of the subsequent Revenue Acts, so that a decision in the present case will affect transactions governed by these several acts.

to override the finding of the Board as to the nature of the transaction and to rule that the receipt of the certificates and the purchase of stock by virtue of them constituted a dividend.

(2) Whether, if it be assumed that there was such an excess of value and that the transaction constituted a dividend, the excess is to be ascertained as of the date when the rights attached to stock of record of The American Superpower Corporation or as of the date when the purchase certificates were received by the petitioner or as of the date when the petitioner exercised his option to purchase.

(3) Whether it was competent for the Circuit Court of Appeals to override the finding of the Board as to the fair market value of the stock in question and to hold that the value was materially more than the prices paid by the petitioner.

Statement.

For a statement of the facts material for the present purpose the petitioner begs leave to refer to the petition for certiorari.

Specification of Errors.

The petitioner's objections to the decision of the Circuit Court of Appeals may be summarized as follows:—

1. The court erred in not accepting the finding of the Board of Tax Appeals as to the nature of the transactions in question and in assuming to find that these transactions constituted dividends and gave rise to tax liability as of the dates upon which the rights evidenced by the respective purchase certificates were exercised by the petitioner.

2. The court erred in not accepting the finding of the Board of Tax Appeals as to the value of the stock which

the petitioner bought and in assuming to make different findings on that subject.

Argument.

For a summary of the argument which follows, the petitioner begs leave to refer to subdivision 18 of the petition for certiorari (pp. 7-9, *supra*). The differences between the results which are arrived at in the present case according as one or the other of the conflicting theories is followed may, however, be indicated by applying these several theories to the respective issues of purchase certificates:—

1. According to the ruling of the Commissioner of Internal Revenue, the petitioner received taxable income on January 26, 1929, May 8, 1929, and June 18, 1929, respectively, to the aggregate amount of $160,115.50 (R. 71-77).

2. According to the view taken by the Circuit Court of Appeals for the Second Circuit in *Ramapo, Inc.*, v. *Commissioner*, 84 F. (2d) 986, the petitioner received taxable income on February 1, 1929, May 13, 1929, and June 24, 1929, respectively, to the aggregate amount of $199,091.25 (see tabulations of market prices for these dates, R. 71, 74, 76).

3. According to the majority of the Circuit Court of Appeals for the First Circuit the petitioner received taxable income on February 15, 1929, May 23, 1929, and July 2, 1929, respectively, to the aggregate amount of $179,055 (see same tabulations).

4. According to the dissenting opinion in the case at bar and according to the view expressed by the Circuit Court of Appeals for the Fourth Circuit in *Helvering* v. *Bartlett*, 71 F. (2d) 598, and by the Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *Cummings*, 77 F. (2d) 670, the petitioner received no taxable income at all.

I.

The Transactions Constituted Sales and not Dividends.

If the price paid by the petitioner was no more than the fair market value of the stock, there can be no tax liability on any theory. Even if it were conclusively established, however, that the price was less than the fair market value, it would not follow that the transactions were taxable.

It may be assumed for the sake of argument that a transaction which is in form a sale by a corporation to its stockholders may under some circumstances constitute a dividend. This, however, is true only when the transaction is in substance a dividend and is given the form of a sale merely to disguise its true nature. The general rule is that a sale by a corporation to its stockholders, even if the price is much less than the fair value of the property, is not taxable as a dividend.

> *Taplin* v. *Commissioner* (C.C.A. 6) 41 F. (2d) 454.
> *Van Vorst* v. *Commissioner* (C.C.A. 9) 59 F. (2d) 677.

In the case last cited the court said (at p. 680):—

> "It is earnestly contended that the transaction denominated a sale was in fact a 'dividend' within the meaning of §201 (a) [of the Revenue Act of 1924, corresponding to §115 (a) of the Revenue Act of 1928] in that it was in effect a distribution made by the corporation to one of its shareholders in property out of its accumulated earnings. . . . If this contention is to be sustained, it must be based upon the proposition urged that, because the consideration was so inadequate and the purchaser was the principal stockholder, it should for these reasons alone be regarded as a taxable distribution.
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> "The contention that a transaction which is in form a sale may, nevertheless, constitute a distribution to a stockholder of corporate assets or earnings may be conceded. It does not follow, however, that every such sale should be regarded as a distribution. . . . In the absence of other showing, the mere fact that the purchaser is a stockholder of the vending corporation does not change the character of the transaction."

Whether a given transaction constitutes a sale or a dividend is a question of fact largely dependent upon intention and to be determined according to the evidence in the particular case, just as it is a question of fact whether, for example, a bonus received by an employee is a gift or additional compensation.

Salvage v. *Commissioner* (C.C.A. 2) 76 F. (2d) 112.
Bass v. *Hawley* (C.C.A. 5) 62 F. (2d) 721.
Fisher v. *Commissioner* (C.C.A. 2) 59 F. (2d) 192.
Durkee v. *Welch* (D.C. S.D. Cal.) 19 F. (2d) 339.
Becker Brothers Co. v. *United States* (C.C.A. 2) 7 F. (2d) 3.
United States v. *Philadelphia Knitting Mills Co.* (C.C.A. 3) 273 Fed. 657.

The following extract from the opinion in *Schumacher* v. *United States,* 74 Ct. Cl. 720, illustrates the controlling significance of intention in situations of this kind (italics supplied):—

> "The plaintiff suggests the use of the words 'compensate employees' and 'additional compensation,' in the secretary's letter, 'merely emphasizes that inartistic and unintentionally misleading language was em-

ployed to describe what was *intended* to be, and what actually were, gifts.' We do not agree with plaintiff that these expressions are inartistic, or that they are misleading. The words 'compensate employees,' 'additional compensation,' and 'bonus' have a precise and well-understood meaning, and in the absence of any fact or circumstances showing they were not used in their ordinary sense they must be accorded their usual signification. *It is significant of the intention of the parties that the word 'gift' nowhere appears in the entire transaction. When the payments are referred to, they are invariably designated as 'additional compensation,' 'compensate employees,' or 'bonus' indicating beyond question that the payments were not gifts or gratuities.*

* * * * * * *

"We hold, therefore, that the payment of $100,000 to the plaintiff on January 2, 1925, by the stockholders' committee was *intended* to be, and was, additional compensation for services rendered."

In the present instance the Board of Tax Appeals has found,—and the propriety of the finding has not been questioned,—that there was no intention to distribute to the stockholders of The American Superpower Corporation any of its earnings or assets, but that *the purpose was to build up its cash position and to create a wide market for the stock of The United Corporation* (R. 167, 170). The price at which the first lot of The United Corporation stock was offered to the stockholders of The American Superpower Corporation represented, as noted above, the precise amount fixed by the Commissioner as the fair market value of that stock. The price paid by the stockholders was likewise the exact price paid by The American Superpower Corporation for the stock of The United Corporation and

of The Commonwealth & Southern Corporation measured by the value of the securities given in exchange (R. 89-91). As pointed out in the petition for certiorari (pp. 1-2, *supra*) the sale of this stock to the stockholders of The American Superpower Corporation was a part of the plan pursuant to which it was acquired.

It is thus apparent that, as the Board said, "no valid argument can be made that Superpower intended to distribute to its stockholders any portion of its assets by selling 821,472 common shares of United to them at a fair market value" (R. 170). Upon each of the three sales, moreover, The American Superpower Corporation realized a large profit with reference to the cost of the securities given by it in exchange for those sold (R. 168-169). So far as appears, the course pursued was an eminently judicious means of attaining the objects which the officers of The American Superpower Corporation had in view; there is nothing to suggest that it would have been more prudent to have thrown these large blocks of stock on the market and to have taken the chances as to sums realized.

The majority of the Circuit Court of Appeals in the case at bar said (R. 199):—

> "The question is not one of intention, but of what was in fact done. The statute defines dividend. . . . It says nothing about intention. The transaction is to be judged by the effect of it."

It is apparent that this assertion was wrong unless it can be said that under the particular circumstances disclosed in the present case the intention of the parties was immaterial and that, notwithstanding their intention, the transactions constituted dividends as matter of law. As shown by the cases cited above, this cannot be said merely because the price may have been less than the actual value of the stock. The precise question is whether a transaction fully intended

to be a sale and nothing else nevertheless constitutes a dividend as matter of law if there is present the additional fact that the property sold was offered to all the stockholders *pro rata*. The majority of the Circuit Court of Appeals for the First Circuit answer this question in the affirmative. The Circuit Court of Appeals for the Second Circuit,—in *Ramapo, Inc.*, v. *Commissioner*, 84 F. (2d) 986,—and the Circuit Court of Appeals for the Seventh Circuit,—in *Commissioner* v. *Mayer*, 86 F. (2d) 593,—have held that sales like those now in question constitute dividends, though neither court has ruled except by implication that the intention of the parties is immaterial. The dissenting judge in the present case, the Circuit Court of Appeals for the Fourth Circuit,—in *Helvering* v. *Bartlett*, 71 F. (2d) 598,—and the Circuit Court of Appeals for the Fifth Circuit,—in *Commissioner* v. *Cummings*, 77 F. (2d) 670,—answer the question in the negative. In *Helvering* v. *Bartlett* the court said (at p. 600):—

> "It seems clear that one is not to be taxed as upon income merely because he acquires an option which he might sell for value. If he allows the option to expire without exercising it, he has, of course, received no income. If he sells his rights under the option, he is taxable on the amount received on the sale. If he exercises it by making a purchase, his income from the transaction is determined on the basis of the profit realized when he sells the property purchased.
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> "In *Miles* v. *Safe Deposit & Trust Co.*, 259 U.S. 247, it was held that, where a stockholder sold rights to subscribe to new stock in a corporation, the amount thus realized was taxable as income; but the court pointed out that, if he had decided to accept the new shares instead of selling the rights, there would have been no

profit and hence no taxable income. It is true that in that case, it was the stock of the same corporation which was referred to; but the same principle would hold as to the purchase of stock of another corporation. No profit is realized upon a purchase; and the mere according of a right to purchase is not to be treated as a dividend or distribution of assets, unless these are in fact involved and the right to purchase is a mere cloak for a transaction which is essentially something else.

* * * * * * *

"Even a purchase at a bargain does not result in taxable income, unless used as a cloak for what is in fact a dividend. *Commissioner* v. *Van Vorst,* 59 F. (2d) 677.

* * * * * * *

"As has been often said, taxation is a practical matter. The income tax law is concerned, generally speaking, only with realized gains or losses. *Lucas* v. *American Code Co.,* 280 U.S. 445, 449; *Burnet* v. *Logan,* 283 U.S. 404, 413. And no gain has been realized by this taxpayer as a result of the allotment to him of the rights in question or of his purchase under those rights. That he might have realized a profit if he had sold the rights is beside the point. Taxes must be imposed on the basis of what has happened, not on the basis of what might have happened. It is important to note that the exact case here presented is covered by G. C. M. 7246, C. B. 1929, p. 80; and the administrative practice thus prescribed is entitled to great weight in determining the applicability of the statute which the government invokes. *Logan* v. *Davis,* 233 U.S. 613, 627."

At the hearing in the Circuit Court of Appeals it was suggested by the Commissioner that *Helvering* v. *Bartlett* was

distinguishable on its facts. Brief analysis, however, is sufficient to show *Helvering* v. *Bartlett* is substantially identical with the case at bar, especially with reference to the options issued by The American Superpower Corporation in January and June. In each of those instances the options were issued in connection with the original organization of the corporation whose shares were covered by the options. The only difference in point of fact is that in the Bartlett case, after the original corporation had voted to purchase 50,000 shares of the new company, it offered half of these shares to its shareholders at the same price and they were sold directly to the shareholders without the completion of the purchase by the original company. The original corporation had the right to buy the shares offered to its shareholders, would have had to take them up if they had not, and could have retained for itself, if it had so chosen, the excess value over the purchase price. It gave up this right to its shareholders; and the fact that the transaction did not go through its books furnishes no ground for distinguishing the case from the case at bar. This was in effect recognized in *Ramapo, Inc.,* v. *Commissioner,* 84 F. (2d) 986; the court made no attempt to distinguish *Helvering* v. *Bartlett,* but merely remarked that, "if *Helvering* v. *Bartlett* be deemed to hold the contrary, we cannot follow it."

In *Commissioner* v. *Cummings, supra,* which is likewise indistinguishable in principle from the case at bar, the court said (at p. 672):—

> "Taxation does not concern itself with hypotheses, but with real situations. *Helvering* v. *Bartlett,* 71 F. (2d) 598. The real situation here is that detachable stock rights, purchased and owned detached from the ownership of stock, and having a value of around $50 a right, were exercised. Had these warrants been sold, the gains would have been taxable as income. *Metcalf's*

Estate v. *Commissioner,* 32 F. (2d) 192; *Helvering* v. *Bartlett, supra.* They were not sold; they were exercised in the purchase of the stock. They were nothing but options to purchase stock. Neither their purchase nor their exercise resulted in taxable gain. They came into existence as property when they were purchased; they disappeared as property when, instead of being sold or exchanged as property, they were by their exercise merged into the executed contract represented by the stock they gave the right to buy. *Helvering* v. *Commissioner, supra.* The shares thus acquired came to the taxpayer as new property. *Wood* v. *Commissioner,* 75 F. (2d) 364. They may not be considered as standing for the options upon the exercise of which they were purchased, and therefore as held for more than two years prior to their exchange and sale. The result of the facts stipulated is that whatever the taxpayer might have done, what he did do was to exercise his rights to buy stock; that the exercise of this option gave rise to no taxable gain. It merely put him in the position of acquiring shares of stock as new capital, as to which, when he sold them, he had to account for the profits on the basis of their cost, which was the cost of the warrants, plus $30,050 cash paid when the stock was acquired."

The Board of Tax Appeals has consistently acted on the principle applied in the cases last cited.

Van Vorst v. *Commissioner,* 22 B.T.A. 632.
Everhart v. *Commissioner,* 26 B.T.A. 318.
Powel v. *Commissioner,* 27 B.T.A. 55.
W. M. Ritter Lumber Co, v. *Commissioner,* 30 B.T.A. 231, 274.
Freshman v. *Commissioner,* 33 B.T.A. 394, 403-404.

The petitioner submits that the view taken in these cases is clearly sound, but will not attempt at this time to elaborate this position. It is sufficient, the petitioner believes, to point out that the case at bar presents in this aspect a direct conflict between decisions of different Circuit Courts of Appeals with respect to a question whose general importance amply justifies examination by the court of last resort and that the decisions in the Second and Seventh Circuits cited above were made with very little examination of the controlling principles; in *Ramapo, Inc.*, v. *Commissioner*, 84 F. (2d) 986, it was, indeed, the taxpayer who contended that the issue of purchase warrants constituted a dividend.

The divergence of the decisions is further emphasized by the sharp differences of opinion noted above as to the date as of which the amount upon which the taxpayer is assessable should be ascertained, if it is assumed that the sales were equivalent to dividends. These differences result from the conflicting theories as to what it is that constitutes the dividend, if, indeed, there was any dividend at all. According to the decision in *Ramapo, Inc.*, v. *Commissioner*, 84 F. (2d) 986, it was the issue of the purchase certificates that amounted to the payment of a dividend; on this assumption the stockholder was taxable for the value of the stock to which the certificates referred even if he allowed the certificates to lapse and received no benefit from them at all. The majority in the case at bar, on the other hand, consider that it was the actual purchase which constituted the dividend and that, unless the stockholder either sold the certificate or exercised the privilege of purchase, he received no taxable income.

II.

The Finding of the Board of Tax Appeals as to the Value of the Stock in Question was conclusive.

Unless the fair market value of the stock when bought by the petitioner exceeded the prices paid by him, the transaction could not give rise to tax liability on any theory. The evidence before the Board of Tax Appeals consisted of a stipulation setting out a great variety of facts bearing on the question of value (R. 68-161). The Board was unable to find that there was in fact any excess of value and, indeed, made with respect to the first set of purchase certificates an affirmative finding that the value did not exceed the amount paid by the petitioner, *i.e.*, $25 per share (R. 170-171). Although the findings of the Board were in the nature of inferences drawn from the facts stipulated, these findings were no less binding on the Circuit Court of Appeals than they would have been if based on oral testimony.

Helvering v. *Rankin*, 295 U.S. 123.
General Utilities Co. v. *Helvering*, 296 U.S. 200.

It is true that the Circuit Court of Appeals was not concluded by the findings of the Board if these were wrong as matter of law. It is not, however, suggested that this was the case; on the contrary, it appears that the Commissioner, in determining the tax liability of The American Superpower Corporation for 1929, fixed the fair market value of the shares of The United Corporation held by it in January, 1929, at $25 per share (R. 89, 167). It was proper, of course, to consider daily quotations of the rights on the Curb, but these quotations were to be weighed with all the other evidence and were of themselves indecisive, espe-

cially when the abnormal conditions which existed in 1929 are considered.

San Francisco National Bank v. *Dodge*, 197 U.S. 70.
Strong v. *Rogers* (C.C.A. 3) 72 F. (2d) 455.
Heiner v. *Crosby* (C.C.A. 3) 24 F. (2d) 191.

The majority of the Circuit Court of Appeals in this respect fell into the same error as that corrected by this court in the very recent case of *Elmhurst Cemetery Association* v. *Commissioner*, 300 U.S. — (Feb. 1, 1937) and assumed to make findings *de novo* substantially as upon an appeal in equity. It is evident that this misconception obtains in the First Circuit no less than in the Sixth and that the intervention of this court is necessary if the functions of the Circuit Courts of Appeals in cases of this kind are not to be distorted.

The petitioner accordingly submits that his petition for certiorari is well grounded and should be granted.

ROBERT G. DODGE.
HAROLD S. DAVIS.

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143275—37

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BRADLEY W. PALMER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit, entered in the above entitled cause February 12, 1937.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 161–176) is reported in 32 B. T. A. 550. The opinion of the Circuit Court of Appeals (R. 195–204) has not yet been officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 12, 1937 (R. 204). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The court below held that where a corporation issues to its stockholders rights to acquire from it shares of stock which it owns in other corporations, at prices substantially less than the fair market value of such shares, and the rights are exercised, there is a taxable dividend to the stockholders. The question presented is as of what date should the stock or rights be valued for the purpose of determining the amount of the dividend.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or

the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of dividend.*—The term "dividend" when used in this title (except in section 203 (a) (4) and section 208 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

* * * * *

STATEMENT

On January 1, 1929, the respondent was the owner of 6,396 shares of common stock of the American Superpower Corporation (hereinafter referred to as Superpower), and on June 10, 1929, he acquired four additional shares, making a total of 6,400 shares of Superpower held by respondent on that date. On or about June 11, 1929, the common stock of Superpower was split up five for one and respondent received 32,000 shares of the new common stock for the 6,400 shares originally held by him. (R. 69.)

On January 23, 1929, Superpower was the owner of 2,210,853 shares of common stock of the United Corporation (hereinafter referred to as United), and on that date its board of directors approved a plan for distributing a portion of Superpower's holdings of United stock to its stockholders. By

resolutions then adopted, all its stockholders of record on January 26, 1929, were given the right to acquire from Superpower, United stock at $25 per share and at the rate of one share of United stock for each two shares of Superpower stock (R. 69–70.)

On January 31, 1929, certificates dated February 1, 1929, were mailed by Superpower to all its stockholders of record on January 26, 1929. Respondent, on February 1, 1929, received his certificate which recited that he, as the holder of 6,396 shares of Superpower stock, was entitled to acquire from the corporation 3,198 shares of United stock at a price of $25 per share. On February 15, 1929, respondent paid to Superpower the sum of $79,950 in cash, surrendered the certificate, and received 3,198 shares of United Stock. On January 26, 1929, the number of shares of common stock of Superpower outstanding was 1,642,944 and the number of rights issued was the same. (R. 70–71.)

Starting on January 25, 1929, the above mentioned rights were dealt in on the New York Curb Exchange and ranged from a low of 11⅝ on January 25, to a high of 19⅝ on January 31, and to a low of 12⅜ on February 15. On January 26, the date named in the resolution for determining the stockholders of record entitled to participate in the distribution, they sold on the market for a high of 12⅞ and a low of 12⅛; on February 1, the date the rights were received by respondent, they sold for a high of 18 and a low of 16¼; on February 15, the

date the rights were exercised by respondent they sold for a high of 13¼ and a low of 12⅜. (R. 71.) On January 29, 30, and 31, 1929, Superpower sold to the public substantial blocks of United common at prices ranging from $56.96 to $63.46 per share. (R. 88.)

On May 1, 1929, similar action was taken by the directors of Superpower with respect of further holdings of United common stock, its stockholders of record on May 8, 1929 being given the right to acquire United stock at $30 per share and at the rate of one share of United for each four shares of Superpower stock. On May 13, 1929, respondent received from Superpower a certificate which recited that he, as the owner of 6,396 shares of Superpower common stock, was entitled to acquire from the corporation 1,599 shares of United stock at a price of $30 per share. On May 24, 1929, respondent paid to Superpower the sum of $47,970 in cash, surrendered the certificate and received 1,599 shares of United stock. On May 8, 1929, the number of shares of Superpower outstanding was 1,643,216, and the number of rights issued was 1,643,216. (R. 72–73.)

Starting on May 2, 1929, the aforementioned rights were dealt in on the New York Curb Exchange and ranged from a low of 6⅛ on May 2nd to a high of 11⅜ on May 11th. (R. 73–74.)

Prior to June 18, 1929, Superpower acquired certain shares of common stock of the Common-

wealth and Southern Corporation. On June 5, 1929, Superpower's board of directors adopted certain resolutions pursuant to which its common stockholders of record on June 18, 1929, were given the right to acquire from the corporation one share of Commonwealth and Southern Corporation stock for each ten shares of Superpower stock. (R. 74, 32–33.) On June 23, 1929, respondent received a certificate which recited that he, as the holder of 32,000 shares of Superpower stock was entitled to acquire from the corporation 3,200 shares of Commonwealth and Southern Corporation stock at a price of $15 per share. On July 2, 1929, respondent paid to Superpower the sum of $48,000 in cash, surrendered the certificate, and received from the corporation 3,200 shares of Commonwealth and Southern Corporation stock. On June 18, 1929, the number of shares of common stock of Superpower outstanding was 8,242,310 and the number of rights issued was 8,242,310. (R. 75–76.)

Starting on June 6, 1929, these rights were dealt in on the New York Curb Exchange and ranged from a low of $\frac{9}{16}$ to a high of $1\frac{15}{16}$. (R. 76.)

The Commissioner of Internal Revenue determined that the respondent was in receipt of taxable dividends as a result of the foregoing transactions and determined the amount of the dividend by valuing the rights as of the dates named in the corporate resolutions for determining the stockholders of record entitled to receive

the rights. Before the Board of Tax Appeals the Commisioner asked that the deficiency be increased should the Board find that in determining the amount of the dividend the stock or rights should be valued as of some other date. (R. 63.) The Board of Tax Appeals held that the respondent was not in receipt of taxable dividends as a result of the above mentioned transaction and therefore found it unnecessary to pass upon the question.

In petitioning for review before the Circuit Court of Appeals, the Commissioner assigned as error, *inter alia*, the failure of the Board to hold that taxable dividends had been received equal to the market value of the rights when receivable by respondent (R. 189, par. 7) or when received by respondent (R. 190, pars. 8, 9). The Circuit Court of Appeals reversed the judgment of the Board, holding that taxable dividends had been received, but that their amount should be determined by the value of the stock as of the date the rights were exercised (R. 200).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that, for the purpose of determining the amount of the dividend, the stock or rights should be valued as of the date the rights were exercised.

2. In failing to hold that, for the purpose of determining the amount of the dividend, the stock or

rights should be valued as of the date the rights were received by the taxpayer.

3. In the alternative, in failing to hold that, for the purpose of determining the amount of the dividend, the stock or rights should be valued as of the record dates or the dates when the rights were receivable by the taxpayer.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals, holding that the amount of the dividend should be determined by valuing the stock or rights as of the date the rights were exercised, is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Ramapo, Inc.* v. *Commissioner,* 84 F. (2d) 986. That case involved the same rights as are under consideration here, and the court, citing the decision of this Court in *Avery* v. *Commissioner,* 292 U. S. 210, held that the rights should be valued as of the dates the certificates or warrants were received by the taxpayer. That court likewise held that the several distributions of rights represented dividends in the hands of the taxpayer, and on that issue the decision is in harmony with the decision of the court below in the instant case.

2. The taxpayer has heretofore filed a petition for certiorari which is now pending before this Court under the title of *Palmer* v. *Helvering,* No. 848, present term. That petition seeks review of the question whether taxable dividends were re-

ceived. While there is no conflict on that question, we filed a memorandum not opposing the granting of the writ, because of the importance of the question and the appropriateness of passing upon the whole case in view of the Commissioner's intention to file the present petition. Likewise, we did not oppose the taxpayer's petition in *Mayer* v. *Helvering,* now pending, No. 862, present term, where the same stock rights are involved. If certiorari is granted in those two cases it should, we submit, be granted here, so that the Court may pass upon the question in its entirety.

CONCLUSION

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

MAY 1937.

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Supreme Court of the United States.

OCTOBER TERM, 1937.

No. 19.

BRADLEY W. PALMER,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

No. 59.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

BRADLEY W. PALMER.

BRIEF FOR BRADLEY W. PALMER.

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Revenue Act of 1928, §115a. 2

Supreme Court of the United States.

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BRADLEY W. PALMER.

BRIEF FOR BRADLEY W. PALMER.

These cross-writs of certiorari bring up a judgment of the Circuit Court of Appeals for the First Circuit reversing (under date of February 12, 1937) an order of the Board of Tax Appeals. The parties will be referred to as "the taxpayer" and "the Commissioner," respectively.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals is reported in 32 B.T.A. 550. The opinions of the majority and minority of the Circuit Court of Appeals appear in 88 F. (2d) at pages 559 and 562, respectively.

Questions Presented.

The taxpayer received as a stockholder of The American Superpower Corporation certificates entitling him to buy of that corporation at specified prices shares of stock in other corporations owned by it. The taxpayer availed himself of the opportunity afforded by the certificates and purchased the stock to which they related. The Board of Tax Appeals found as a fact (R. 163, 169) that the issue of the certificates and the purchase of stock by virtue of them was a bona fide sale and purchase and was not intended to constitute and did not constitute a dividend within the meaning of the governing statute (Revenue Act of 1928, §115a), which reads as follows:—

> "The term 'dividend' when used in this title . . . . means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913."

The Board further found as a fact that the fair market value of the stock in question did not exceed the amount paid by the petitioner for it (R. 164, 170-171).

Briefly stated the questions now presented are,—

(1) Whether (*a*), if it be assumed that the value of the stock in question at the decisive dates,—whatever those may be,—was in excess of the prices paid by the taxpayer, it was competent for the Circuit Court of Appeals to override the finding of the Board as to the nature of the transaction and to rule that the receipt of the certificates and the purchase of stock by virtue of them constituted a dividend, and whether (*b*) it was competent for the Circuit Court of Appeals to override the finding of the Board as to the fair market value of the stock and to hold that the value at the decisive dates was materially more than the prices paid by the taxpayer.

(2) Whether, if it be assumed that there was such an excess of value and that the transaction constituted a dividend, the excess is to be ascertained as of the date when the purchase certificates were received by the taxpayer or as of the date when the taxpayer exercised his option to purchase.

Statement.

The case was heard by the Board of Tax Appeals upon a long stipulation of facts (R. 64-155), much of which is now immaterial, either because it related to a minor issue as to which both parties accept the decision of the Board or because the subject-matter is covered by findings of the Board as to which no question is raised.

It was agreed that during the year 1929 the taxpayer was the owner of common stock of The American Superpower Corporation and that as such he received on three occasions during that year certificates authorizing him to buy of that corporation at specified prices shares of stock in other corporations owned by it (R. 65, 161-162). The first of these issues of purchase certificates was voted by the directors on January 23, 1929, and related to the purchase of shares of The United Corporation (R. 66). Starting on January 25, 1929, and continuing to February 18, 1929, when the "rights" expired, they were traded in on the New York Curb Exchange. In the highly speculative market then existing the "rights" ranged in price from 11⅝ to 21 in a space of five days (R. 67).

There was nothing to indicate that these substantial sale prices were foreseen by the parties at the time when the plan of issuing purchase certificates to the stockholders of The American Superpower Corporation was formed or that the plan was in any sense a cloak to cover a dividend. On the contrary, it appeared that the formation of The

United Corporation was the outgrowth of an agreement entered into in 1928, by J. P. Morgan & Company and other bankers (including Bonbright & Company, who controlled The American Superpower Corporation), whereby the parties agreed to act in unison with respect to their holdings of large blocks of stock in the Public Service Corporation of New Jersey, The United Gas Improvement Company and the Mohawk Hudson Power Corporation (R. 73-74). As a result of further negotiations it was agreed in December, 1928, to organize a holding company and transfer to it the stock in question in exchange for its own securities (R. 74-75). On January 7, 1929, The United Corporation was organized accordingly (R. 75). On January 9, 1929, the directors of The American Superpower Corporation accepted a proposition of The United Corporation to issue certain of its securities to The American Superpower Corporation in exchange for shares of Public Service Corporation of New Jersey and of The United Gas Improvement Company (R. 76; for complete copies of the proposition and of the minutes of the meeting at which action was taken thereon see R. 49-52 and R. 39-49, respectively). The minutes contain the following recital respecting a statement made by Alfred M. Loomis, president of The American Superpower Corporation, to the directors just before they voted to accept the proposition of The United Corporation (R. 47):—

> "Mr. Loomis stated that, if the offer were accepted and the stock of The United Corporation acquired, as therein contemplated, the officers expected at some later date to submit to the Board a proposition, by which The American Superpower Corporation would dispose of a substantial part of the stock of The United Corporation so acquired to the holders of the common stock of the American Superpower Corporation by offering to said stockholders a right to purchase part

of the Corporation's holding of The United Corporation stock. By this means, there would be a wide distribution of the stock of The United Corporation."

Even before the organization of The United Corporation the officers of The American Superpower Corporation had formed the intention of offering to the stockholders a substantial part of the stock of The United Corporation when received. The facts as to this matter were stipulated as follows (R. 79-80):—

"In connection with certain of the conferences which preceded the formation of The United Corporation, the matter of the disposition by The American Superpower Corporation of a part of the stock of The United Corporation to be received by it was discussed. Mr. Harold Stanley of the firm of J. P. Morgan and Company initiated such discussion. In that connection Mr. Alfred L. Loomis of Bonbright and Company (who was also chairman of The American Superpower Corporation) stated to some of the other parties to the negotiations, including Mr. Stanley, that at the first meeting of the board of directors of The American Superpower Corporation which would be called to consider the acquisition by The United Corporation of the common stock of the Public Service Corporation of New Jersey and the common stock of The United Gas Improvement Company held by The American Superpower Corporation he intended to advise the board that the officers of The American Superpower Corporation expected to submit to the board at some later date a proposition by which The American Superpower Corporation would dispose of a substantial part of the stock of The United Corporation to be so acquired."

The Commissioner of Internal Revenue in determining the federal tax liability of The American Superpower Corporation for the year 1929 found that the total fair market value of The United Corporation securities when received by The American Superpower Corporation was $72,480,000, which was substantially the aggregate market value of the securities given in exchange (R. 80-82, 84-85). For this purpose the Commissioner allocated a value of par to the preference stock, one dollar to each of the option warrants (entitling the holder to purchase common shares at $27.50 as above stated) and $25 per share to the common stock (R. 84-85, 164).

J. P. Morgan & Company and Bonbright & Company, pursuant to agreements with The United Corporation, each subscribed for and bought 400,000 shares of its common stock at $22.50 per share (R. 97-99, 164).

The American Superpower Corporation did not reflect on its books of account any profit or loss in connection with the exchange of securities previously held by it for securities of The United Corporation, though the securities so transferred had cost it only $25,945,093.88 (R. 83-84).

In accordance with the plan above described, the directors of The American Superpower Corporation on January 23, 1929, voted to offer to the common stockholders of record January 26, 1929, the privilege of purchasing at $25 per share one half of a share of the above-mentioned stock of The United Corporation for every share of common stock held in The American Superpower Corporation, this privilege to be evidenced by negotiable purchase certificates which should become void unless the privilege of purchase were exercised on or before February 15, 1929 (R. 15-16, 66).

On May 1, 1929, and June 5, 1929, respectively, the directors of The American Superpower Corporation voted to offer to the common shareholders the privilege of purchas-

ing additional stock of The United Corporation at $30 per share and stock of The Commonwealth & Southern Corporation (in the organization of which The American Superpower Corporation had participated in May, 1929) at $15 per share (R. 24-26, 31-33).

Pursuant to these votes the taxpayer received on February 1, 1929, May 5, 1929, and June 24, 1929, respectively, certificates giving him the privilege of purchasing 3198 shares of The United Corporation at $25 per share, 1599 shares of The United Corporation at $30 per share and 3200 shares of The Commonwealth & Southern Corporation at $15 per share (R. 66, 68, 71).

On February 15, 1929, the taxpayer exercised his option under the first set of purchase certificates and purchased the shares to which these referred, paying for such shares $79,950 (R. 67). On May 24, 1929, the taxpayer exercised his option under the second set of purchase certificates and purchased the shares to which these referred, paying for such shares $47,970 (R. 69). On July 2, 1929, the petitioner exercised his option under the third set of purchase certificates and purchased the shares to which these referred, paying for such shares $48,000 (R. 72). Each of these sales represented a considerable profit to The American Superpower Corporation over the cost of the property exchanged by it for stock of The United Corporation and of The Commonwealth & Southern Corporation, respectively (R. 85-86).

The taxpayer did not during the year 1929 sell or otherwise dispose of any of the stock purchased by him as aforesaid. Being advised that his receipt of the respective purchase certificates and the purchases made by him thereunder gave rise to no taxable income, he did not include in his return of income for 1929 any item reflecting these transactions. The Commissioner ruled to the contrary and assessed a deficiency with respect to the alleged market values of the purchase certificates as of the dates fixed by

the respective resolutions for determining the stockholders of record entitled to participate therein (R. 4, 11-12, 63).

The Board of Tax Appeals made the following findings as inferences from the facts summarized above and from the great mass of additional detail contained in the stipulation (R. 160, 164, 169; italics supplied):—

> "At the time of the organization of United, Superpower contemplated selling a portion of the United common shares to be acquired by it to its stockholders. *This was for the purpose of building up its cash position and of creating a wide market for the United stock.* As soon as it received United common stock it offered to sell pro rata to the holders of its class A and class B common stock a one-half share of United common stock for each of its common shares outstanding, at $25 per share.
>
> * * * * * * * * * *
>
> "As above indicated, the stipulated facts show that the respondent determined the 'total fair market value' of all the securities received by Superpower from United in January, 1929, to be $72,480,000. He allocated this value to the three classes of securities received and determined the fair market value of the common shares to be $25 per share. This is the exact price at which Superpower offered the first block of 821,472 shares of common stock of United to its stockholders. *No valid argument can be made that Superpower intended to distribute to its stockholders any portion of its assets by selling 821,472 common shares of United to them at a fair market value.* Upon the sale of the stock at $25 per share Superpower realized a profit of $16.05 on each share. That $25 was a fair market price for the stock in January 1929 is further evidenced by the fact that J. P. Morgan & Co. and Bonbright &

Co., pursuant to the agreement made between the interested parties, each subscribed for and purchased from United 400,000 shares of its common stock at $22.50 per share.

"The stipulated facts do not show the fair market value of United common stock in May 1929, or of Commonwealth common stock in June and July 1929. The sales of United common in May 1929 were made at $30 per share, or at $5 per share more than the price at which the stock was offered to Superpower's stockholders in January. The Commonwealth stock was acquired by Superpower just before it was offered for sale by Superpower to its stockholders. In selling it at $15 per share Superpower made a profit on each share sold.

* * * * * * * * *

"Upon the entire record we are of the opinion that the petitioner realized no taxable income from the receipt of the purchase certificates involved in this proceeding or from the exercise of them in the purchase of shares of stock of United and Commonwealth. *There is no reason to give to the transaction a different interpretation from that placed upon it by both Superpower and the petitioner. Superpower treated the transaction solely as a sale of a portion of its assets and accounted for the profit realized therefrom. The petitioner likewise treated the transaction as a purchase of shares of stock for cash. If and when he shall sell the shares acquired by him the profit or loss must be predicated upon the basis of the price that he paid for them.*"

The Commissioner petitioned the Circuit Court of Appeals for the First Circuit to review the decision of the Board. The majority of the court accepted the Board's

findings of fact except those relative to the fair market value of the stock purchased by the taxpayer by virtue of the certificates issued to him. As to this point the court assumed to set aside the Board's conclusions and to draw the inference,—chiefly from the market quotations for the purchase certificates,—that the stock to which the respective certificates related was worth substantially more on the dates when the certificates were received than the amounts paid by the taxpayer to The American Superpower Corporation (R. 190-191). The majority then went on to say (R. 191-192):—

> "Apparently the Board held that an intention to make a distribution was essential in order to make the transaction a dividend. The question is not one of intention but of what was in fact done.
>
> "The statute defines dividend. 'The term dividend when used in this title . . . means any distribution made by a corporation to its shareholders whether in money or in other property,' etc. Rev. Act of 1928, chap. 852, Sec. 115 (a). It says nothing about intention. The transaction is to be judged by the effect of it. Where the matter is doubtful the intention of the parties may well be accepted, especially when the property distributed has not a definitely ascertainable value which can be promptly realized. Here the property distributed was readily salable at about twice the amount paid for it. For practical purposes it was equivalent to money. We think the excess value of United stock above the price at which Superpower sold it was clearly a dividend."

The majority further said that "the rights themselves were [not] taxable income," but that, "if exercised, the excess of value of the property acquired over the cash paid for it was a distribution of property and was taxable at

its fair value'' (R. 192). On the strength of the market quotations which were in evidence the majority further held that, notwithstanding the findings of the Board as to the actual value of the stock referred to in the purchase certificates, it had a value substantially in excess of the amounts paid for it and that ''the excess value of . . . [the stock] above the price at which Superpower sold it was clearly a dividend,'' saying that the question was ''not one of intention, but of what was in fact done'' (R. 191-192). As to the dates with respect to which the value should be ascertained the majority said (R. 192):—

> ''The value of the shares of stock should be determined as of the dates when the stock rights were exercised, viz.: under the first offering as of February 15, 1929, under the second offering as of May 24, 1929, and under the third one as of July 2, 1929, for these are the dates on which the taxpayer, in this case, in fact received taxable distributions.''

In a dissenting opinion Judge Wilson said (R. 195-197):—

> ''This was not a distribution of corporate assets, but a sale at a price found by the Commissioner to represent the fair market value of the United stock. The cash received therefor by Superpower restored to it as assets the proportionate fair market value of the securities exchanged by Superpower for the stock of United.
>
> ''We are not concerned with what might have resulted if the petitioner had sold the purchase certificates, or had sold the stock acquired after the exercise of his right to purchase. He did neither.
>
> * * * * * * * * *
>
> ''There is no evidence that the offering of the stock of the United was intended by Superpower as a cloak

for what in fact was a dividend. The Board of Tax Appeals found as a fact that it was not. This court cannot review this finding.

* * * * * * * * *

"Obviously the taxpayer cannot be taxed as income based on the selling price of the purchase certificates during the period he held them, since he did not realize income from them. If he failed to exercise them, he could claim no loss. *Eastern Shares Corporation* v. *Commissioner,* 32 B.T.A. 608. To him they simply represented a right to buy United stock. When exercised they became merely an acceptance of an offer to sell. If the stock proved to have an increased market value in the boom market of 1929 over the cash paid the company, he has not realized on it. To determine taxable income there must be a sale or exchange of property, or something definite other than a fluctuating stock exchange market. The court does not recognize theoretical gains or losses."

In accordance with the opinion of the majority, the Circuit Court of Appeals on February 12, 1937, ordered that the decision of the Board of Tax Appeals be vacated and the case remanded to that Board for further proceedings not inconsistent with the opinion (R. 197). Upon the motion of the taxpayer it was subsequently ordered that the issue of the mandate be stayed (R. 197).

On May 17, 1937, this court granted the taxpayer's petition for a writ of certiorari to review the decision of the Circuit Court of Appeals in so far as it involved a ruling that the receipt of the purchase certificates and the purchase of stock by virtue of them constituted a dividend (R. 197).

On June 1, 1937, this court granted the Commissioner's petition for a writ of certiorari to review the same decision

in so far as it involved a ruling that, assuming that the transaction constituted a dividend, the value of the shares purchased should be determined as of the dates when the purchases were actually made and not as of the dates when the respective purchase certificates were received by the taxpayer (R. 198).

Specification of Errors.

The petitioner's objections to the decision of the Circuit Court of Appeals may be summarized as follows:—

1. The court erred in not accepting the finding of the Board of Tax Appeals as to the nature of the transactions in question and in assuming to find that these transactions constituted dividends and gave rise to tax liability as of the dates upon which the rights evidenced by the respective purchase certificates were exercised by the petitioner.

2. The court erred in not accepting the finding of the Board of Tax Appeals as to the value of the stock which the petitioner bought and in assuming to make different findings on that subject.

The error assigned by the Commissioner is in substance that the Circuit Court of Appeals should have held that the amount of the supposed dividends should be determined as of the dates when the respective purchase certificates were received, and not as of the respective dates upon which the taxpayer exercised his right to purchase the stock in question.

Summary of Argument.

1. The transactions in question gave rise to no taxable income.

(*a*) A sale of property by a corporation to its stockholders is not taxable as a dividend simply because the

price may have been less than the fair value of the property. If the real purpose is to pay a dividend and the form of a sale is adopted in order to conceal the true nature of the transaction, the substance will doubtless prevail over the form. If, correspondingly, the object is to obtain funds for the corporation through the sale of the property in question and there is no intention to pay a dividend, the transaction constitutes a sale even if the opportunity to buy is offered to the stockholders in proportion to their holdings. If the purpose is to effect a sale and not to pay a concealed dividend, the mere issue of purchase certificates like those now under consideration plainly gives rise to no tax, since the assets of the corporation are not diminished by the issue of the certificates, whereas the statute refers only to a "distribution made by a corporation to its shareholders . . . out of its earnings or profits." Neither does the exercise of the right to purchase constitute a dividend.

The majority of the Circuit Court of Appeals say that the statute "says nothing about intention"; that is true, but it does not follow that intention is immaterial. Whether a given transaction constitutes a distribution or sale depends upon the intention of the parties, just as it is the intention of the parties which determines whether a voluntary payment to an employee shall be deemed a gift or additional compensation. The statute, moreover, does not purport to tax the receipt of benefits by a stockholder, but only distributions "made in money or in other property." In a case like the present there is admittedly no distribution of money. Neither is there any distribution made in property. Since the stockholder pays for the property in question a large part of its value, if not the whole, it cannot be said that the *property* is distributed. An arrangement intended to be a sale and nothing else and enabling the stockholder merely to make a paper profit which may prove wholly illusory and which must, in any case, remain

unrealized unless and until the property is disposed of cannot be called a "distribution" within any ordinary meaning of that word. Whatever the true description of the transaction may be, it is certain that nothing is "distributed," for the simple reason that there is nothing which can be said to form the subject of any "distribution." To stretch this word as the Circuit Court of Appeals has attempted to stretch it reverses the well-settled rule as to the construction of tax statutes.

Gould v. *Gould*, 245 U.S. 151.
United States v. *Merriam*, 263 U.S. 179.
Old Colony R. Co. v. *Commissioner*, 284 U.S. 552.

The pertinence of this principle to the present situation is illustrated by cases in which it was applied to the construction of the analogous term "distributive share" as used in earlier revenue acts.

Page v. *Rives*, 1 Hughes, 297.
Disston v. *McLean* (C.C.A. 3), 147 Fed. 114.
Lynch v. *Union Trust Co.* (C.C.A. 9), 164 Fed. 161.

(*b*) If the amount paid by the taxpayer for the stock was no more than its fair value, there can, of course, be no tax on any theory. The Board of Tax Appeals found upon all the evidence that the amount paid for the stock to which the first issue of certificates related was no more than its fair value, and further found that the evidence did not establish the fair market value of the stock to which the second and third issues related (R. 164). The evidence upon which these findings were based was voluminous. While in the form of a stipulation, it presented a vast mass of detail, and any conclusion as to the value of the stock

was necessarily an inference from all these particulars (R. 64-155). Whatever may be said as to the significance of this or that element, it could not justly be said that the inferences which the Board drew were not such as reasonable men might arrive at upon the evidence taken as a whole. The Circuit Court of Appeals, though purporting to state the issue more narrowly, in substance treated the petition for review as if it had been an appeal in equity and assumed to draw inferences different from those drawn by the Board. As held by this court in the very recent case of *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U.S. 37, the Circuit Court of Appeals ought to have accepted the findings of the Board, even though these findings were in the nature of inferences from facts stipulated.

2. If it be assumed for the sake of argument that there was a dividend to the extent of any excess in the fair value of the stock over the amount paid by the stockholder and that the Circuit Court of Appeals was justified in finding that there was such an excess in fact, the amount of this excess is to be ascertained as of the dates when the taxpayer bought the stock, and not as of the dates when he received the purchase certificates. As has been pointed out above, it is only a "distribution" which the statute taxes. The essence of a distribution is a depletion of the corporation's assets (*Miles* v. *Safe Deposit & Trust Co.,* 259 U.S. 247). There is no depletion of assets on any possible view up to the time when the holder of a purchase certificate exercises the privilege of purchase and so acquires the stock theretofore owned by the corporation. In this respect the decision of the Circuit Court of Appeals for the First Circuit in the case at bar is right and that of the Circuit Court of Appeals for the Second Circuit in *Ramapo, Inc.,* v. *Commissioner,* 84 F. (2d) 986, manifestly wrong.

Argument.

I.

The Transactions gave Rise to no Taxable Income.

1. The Transactions Constituted Sales, and not Dividends.

If the price paid by the petitioner was no more than the fair market value of the stock, there can be no tax liability on any theory. Even if it were conclusively established, however, that the price was less than the fair market value, it would not follow that the transactions were taxable.

It may be assumed for the sake of argument that a transaction which is in form a sale by a corporation to its stockholders may under some circumstances constitute a dividend. This, however, is true only when the transaction is in substance a dividend and is given the form of a sale merely to disguise its true nature. The general rule is that a sale by a corporation to its stockholders, even if the price is much less than the fair value of the property, is not taxable as a dividend.

> *Taplin* v. *Commissioner* (C.C.A. 6) 41 F. (2d) 454.
>
> *Commissioner* v. *Van Vorst* (C.C.A. 9) 59 F. (2d) 677.

In the case last cited the court said (at p. 680):—

> "It is earnestly contended that the transaction denominated a sale was in fact a 'dividend' within the meaning of §201 (a) [of the Revenue Act of 1924, corresponding to §115 (a) of the Revenue Act of 1928] in that it was in effect a distribution made by the corporation to one of its shareholders in property out of its accumulated earnings. . . . If this contention is to be sustained, it must be based upon the proposition

urged that, because the consideration was so inadequate and the purchaser was the principal stockholder, it should for these reasons alone be regarded as a taxable distribution.

* * * * * * * * * *

"The contention that a transaction which is in form a sale may, nevertheless, constitute a distribution to a stockholder of corporate assets or earnings may be conceded. It does not follow, however, that every such sale should be regarded as a distribution. . . . In the absence of other showing, the mere fact that the purchaser is a stockholder of the vending corporation does not change the character of the transaction."

Whether a given transaction constitutes a sale or a dividend is a question of fact largely dependent upon intention and to be determined according to the evidence in the particular case, just as it is a question of fact whether, for example, a bonus received by an employee is a gift or additional compensation. Many decisions to this effect were cited by the taxpayer in the Circuit Court of Appeals.

Salvage v. *Commissioner* (C.C.A. 2) 76 F. (2d) 112; affirmed 297 U.S. 106.

Bass v. *Hawley* (C.C.A. 5) 62 F. (2d) 721.

Fisher v. *Commissioner* (C.C.A. 2) 59 F. (2d) 192.

Durkee v. *Welch* (D.C. S.D. Cal.) 49 F. (2d) 339.

Becker Brothers v. *United States* (C.C.A. 2) 7 F. (2d) 3.

United States v. *Philadelphia Knitting Mills Co.* (C.C.A. 3) 273 Fed. 657.

Schumacher v. *United States*, 74 Ct. Cl. 720.

The following extract from the opinion in the case last cited illustrates the controlling significance of intention in situations of this kind (italics supplied):—

> "The plaintiff suggests the use of the words 'compensate employees' and 'additional compensation,' in the secretary's letter, 'merely emphasizes that inartistic and unintentionally misleading language was employed to describe what was *intended* to be, and what actually were, gifts.' We do not agree with plaintiff that these expressions are inartistic, or that they are misleading. The words 'compensate employees,' 'additional compensation,' and 'bonus' have a precise and well-understood meaning, and in the absence of any fact or circumstances showing they were not used in their ordinary sense they must be accorded their usual signification. *It is significant of the intention of the parties that the word 'gift' nowhere appears in the entire transaction. When the payments are referred to, they are invariably designated as 'additional compensation,' 'compensate employees,' or 'bonus' indicating beyond question that the payments were not gifts or gratuities.*
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> * * * * * * * * *
>
> "We hold, therefore, that the payment of $100,000 to the plaintiff on January 2, 1925, by the stockholders' committee was *intended* to be, and was, additional compensation for services rendered."

The importance of intention in situations analogous to that now disclosed is emphasized by the series of decisions recently rendered by different Circuit Courts of Appeals respecting certain voluntary payments to employees of the Universal Oil Products Company. In each of these cases it has been held that, for the purpose of determining whether

the payments in question should be deemed gifts or additional compensation, the intent with which the payments were made was decisive and that the court could not go behind a finding by the Board of Tax Appeals to the effect that they were intended to constitute compensation.

Hall v. *Commissioner* (C.C.A. 4) 89 F. (2d) 441.
Simpkinson v. *Commissioner* (C.C.A. 5) 89 F. (2d) 397.
Bogardus v. *Helvering* (C.C.A. 2) 88 F. (2d) 646.
Walker v. *Commissioner* (C.C.A. 1) 88 F. (2d) 61.

It is noteworthy that the case last cited was decided by the Circuit Court of Appeals for the First Circuit on the same day as the case at bar. Apparently not appreciating the inconsistency of the two decisions, the court in *Walker* v. *Commissioner* (at p. 62) quoted with approval the following language from *Fisher* v. *Commissioner,* 59 F. (2d) 192 (at p. 193):—

> "Whether a payment in a given case shall be deemed taxable compensation or a gift exempt from tax depends upon the intention of the parties, and particularly that of the employer, to be determined from the facts and circumstances surrounding the transaction."

In the present instance the Board of Tax Appeals has found,—and the propriety of the finding has not been questioned,—that there was no intention to distribute to the stockholders of The American Superpower Corporation any of its earnings or assets, but that *the purpose was to build up its cash position and to create a wide market for the stock of The United Corporation* (R. 160, 163-164). The price at which the first lot of The United Corporation stock was offered to the stockholders of The American Super-

power Corporation represented, as noted above, the precise amount fixed by the Commissioner as the fair market value of that stock. The price paid by the stockholders was likewise the exact price paid by The American Superpower Corporation for the stock of The United Corporation and of The Commonwealth & Southern Corporation measured by the value of the securities given in exchange (R. 84-86). As pointed out above, the sale of this stock to the stockholders of The American Superpower Corporation was a part of the plan pursuant to which it was acquired.

It is thus apparent that, as the Board said, "no valid argument can be made that Superpower intended to distribute to its stockholders any portion of its assets by selling 821,472 common shares of United to them at a fair market value" (R. 164). Upon each of the three sales, moreover, The American Superpower Corporation realized a large profit with reference to the cost of the securities given by it in exchange for those sold (R. 162). So far as appears, the course pursued was an eminently judicious means of attaining the objects which the officers of The American Superpower Corporation had in view; there is nothing to suggest that it would have been more prudent to throw these large blocks of stock on the market and to take the chances as to sums realized.

The majority of the Circuit Court of Appeals in the case at bar said, as noted above (R. 191):—

> "The question is not one of intention, but of what was in fact done. The statute defines dividend. . . . It says nothing about intention. The transaction is to be judged by the effect of it."

It is apparent that this assertion was wrong unless it can be said that under the particular circumstances disclosed in the present case the intention of the parties was immaterial and that, notwithstanding their intention, the

transactions constituted dividends as matter of law. As shown by the cases cited above, this cannot be said merely because the price may have been less than the actual value of the stock, The precise question is whether a transaction fully intended to be a sale and nothing else nevertheless constitutes a dividend as matter of law if there is present the additional fact that the property sold was offered to all the stockholders *pro rata*. The majority of the Circuit Court of Appeals for the First Circuit answer this question in the affirmative. The Circuit Court of Appeals for the Second Circuit,—in *Ramapo, Inc.,* v. *Commissioner,* 84 F. (2d) 986,—and the Circuit Court of Appeals for the Seventh Circuit,—in *Commissioner* v. *Mayer,* 86 F. (2d) 593,—have held that sales like those now in question constitute dividends, though neither court has ruled except by implication that the intention of the parties is immaterial. The dissenting judge in the present case, the Circuit Court of Appeals for the Fourth Circuit,—in *Helvering* v. *Bartlett,* 71 F. (2d) 598,—and the Circuit Court of Appeals for the Fifth Circuit,—in *Commissioner* v. *Cummings,* 77 F. (2d) 670,—answer the question in the negative.

There is little in the opinion in *Ramapo, Inc.,* v. *Commissioner,* 84 F. (2d) 986, that helps the Commissioner in the case at bar. While that case related, indeed, to the same issues of purchase certificates by The American Superpower Corporation as are involved in the present case, the circumstances of the parties were very different. In the *Ramapo* case the taxpayer was a corporation and it asserted that the options which it received were dividends, the value of which was to be deducted from its gross income in determining its taxable income. The Commissioner also treated the value of the rights as dividends, but determined their value as of a different date from that taken by the taxpayer. By amended answer the Commissioner later moved to increase the deficiency determined by him if he

had made any errors in favor of the taxpayer. The Board of Tax Appeals held that the rights were not dividend distributions at all, but merely represented options, and that the entire amount which the petitioner had received from the sale of rights constituted taxable income.

The opinion of the Circuit Court of Appeals in the *Ramapo* case does not deal with the facts appearing in the present record with regard to the circumstances under which the options were issued and the purpose of issuing them. Doubtless because these matters were not brought out, the court disposed of the case with the mere statement that, when a corporation issues rights to purchase stock in another corporation at less than its fair market value, "the issuance of them is a distribution of corporate assets in the amount by which the value of the stock exceeds the price to be paid for it, and, if such excess represents earnings or surplus, is a dividend." It is apparent from this statement that the court did not analyze the situation with care. Even if the statement were not altogether too sweeping in eliminating entirely from consideration the purpose of the transaction and the question whether a sale was in good faith intended rather than a distribution, the court was obviously in error, since the mere *issue* of rights could in no event constitute a distribution of assets. If the rights are not exercised, the corporate assets remain unaffected. Those assets are not diminished unless and until their rights are exercised and the property acquired from the corporation.

The citation of authorities manifests the same lack of analysis. In *Metcalf's Estate* v. *Commissioner,* 32 F. (2d) 192,—a decision of the same Circuit Court of Appeals,—the taxpayer had sold the rights and the question, as the court said, was "whether, by the selling of these rights, the petitioner received taxable income." In *Duke* v. *Commissioner,* 18 B.T.A. 374, and *Bradley* v. *Commissioner,* 1

B.T.A. 111, it was found as a fact that the purpose was to effect a distribution of the company's property among its stockholders whereas in the case at bar the finding is just the reverse. In *Venner* v. *Southern Pacific Co.* (C.C.A. 2) 279 Fed. 832, similarly, it appeared that the whole purpose of the transaction was to distribute among the stockholders property which it had become unlawful for the company itself to hold; the controversy, moreover, was not as to whether the distribution gave rise to tax liability, but whether the particular manner in which it was effected violated the rights of the stockholders.

The opinion in *Commissioner* v. *Mayer,* 86 F. (2d) 593, contains even less discussion of the controlling principles than does the opinion in *Ramapo, Inc.,* v. *Commissioner.* After stating what is undisputed, *i.e.,* "that a dividend of stock of another company may be the subject of an income tax," the court say dogmatically: "Also it is settled that the grant of a right to purchase stock is essentially analogous to a dividend of stock." The decision in the *Ramapo* case is the sole authority cited for this proposition.

The sound view of a situation like the present is, the taxpayer submits, that taken by the Circuit Court of Appeals for the Fourth Circuit in *Helvering* v. *Bartlett,* 71 F. (2d) 598, in which the court said (at p. 600):—

> "It seems clear that one is not to be taxed as upon income merely because he acquires an option which he might sell for value. If he allows the option to expire without exercising it, he has, of course, received no income. If he sells his rights under the option, he is taxable on the amount received on the sale. If he exercises it by making a purchase, his income from the transaction is determined on the basis of the profit realized when he sells the property purchased.
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"In *Miles* v. *Safe Deposit & Trust Co.*, 259 U.S. 247, it was held that, where a stockholder sold rights to subscribe to new stock in a corporation, the amount thus realized was taxable as income; but the court pointed out that, if he had decided to accept the new shares instead of selling the rights, there would have been no profit and hence no taxable income. It is true that in that case, it was the stock of the same corporation which was referred to; but the same principle would hold as to the purchase of stock of another corporation. No profit is realized upon a purchase; and the mere according of a right to purchase is not to be treated as a dividend or distribution of assets, unless these are in fact involved and the right to purchase is a mere cloak for a transaction which is essentially something else.

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"Even a purchase at a bargain does not result in taxable income, unless used as a cloak for what is in fact a dividend. *Commissioner* v. *Van Vorst*, 59 F. (2d) 677.

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"As has been often said, taxation is a practical matter. The income tax law is concerned, generally speaking, only with realized gains or losses. *Lucas* v. *American Code Co.*, 280 U. S. 445, 449; *Burnet* v. *Logan*, 283 U. S. 404, 413. And no gain has been realized by this taxpayer as a result of the allotment to him of the rights in question or of his purchase under those rights. That he might have realized a profit if he had sold the rights is beside the point. Taxes must be imposed on the basis of what has happened, not on the basis of what might have happened. It is important to note that the exact case here presented is covered by G. C. M.

7246, C. B. 1929, p. 80; and the administrative practice thus prescribed is entitled to great weight in determining the applicability of the statute which the government invokes. *Logan* v. *Davis,* 233 U. S. 613, 627."

At the hearing in the Circuit Court of Appeals it was suggested by the Commissioner that *Helvering* v. *Bartlett* was distinguishable on its facts. Brief analysis, however, is sufficient to show that that case is substantially identical with the case at bar, especially with reference to the options issued by The American Superpower Corporation in January and June. In each of those instances the options were issued in connection with the original organization of the corporation whose shares were covered by the options. The only difference in point of fact is that in the *Bartlett* case, after the original corporation had voted to purchase 50,000 shares of the new company, it offered half of these shares to its shareholders at the same price and they were sold directly to the shareholders without the completion of the purchase by the original company. The original corporation had the right to buy the shares offered to its shareholders, would have had to take them up if they had not and could have retained for itself, if it had so chosen, the excess value over the purchase price. It gave up this right to its shareholders; and the fact that the transaction did not go through its books furnishes no ground for distinguishing the case from the case at bar. This was in effect recognized in the *Ramapo* case; the court made no attempt to distinguish the *Bartlett* case, but merely remarked that, "if *Helvering* v. *Bartlett* be deemed to hold the contrary, we cannot follow it."

Commissioner v. *Cummings,* 77 F. (2d) 670, is to the same effect. While the immediate issue was not that now presented, the determining principle was exactly the same. In the following quotation from the opinion of the court

(77 F. [2d] at p. 672) the more important passages are italicized:—

"[The stipulated facts] show merely the issuance and purchase of stock options on Southeastern stock, and the exercise of these options by the purchase of the stock. . . . Taxation does not concern itself with hypotheses, but with real situations. *Helvering* v. *Bartlett* (C.C.A.) 71 F. (2d) 598. *The real situation here is that detachable stock rights, purchased and owned detached from the ownership of stock, and having a value of around $50 a right, were exercised. Had these warrants been sold, the gains would have been taxable as income. Metcalf's Estate* v. *Com'r* (C.C.A.) 32 F. (2d) 192; *Helvering* v. *Bartlett, supra. They were not sold; they were exercised in the purchase of the stock. They were nothing but options to purchase stock. Neither their purchase nor their exercise resulted in taxable gain.* They came into existence as property when they were purchased; they disappeared as property when, instead of being sold or exchanged as property, they were by their exercise merged into the executed contract represented by the stock they gave the right to buy. *Helvering* v. *Comm'r, supra.* The shares thus acquired came to the taxpayer as new property. *Wood* v. *Comm'r* (C. C. A.) 75 F. (2d) 364. They may not be considered as standing for the options upon the exercise of which they were purchased, and therefore as held for more than two years prior to their exchange and sale. *The result of the facts stipulated is that whatever the taxpayer might have done, what he did do was to exercise his rights to buy stock; that the exercise of this option gave rise to no taxable gain.* It merely put him in the position of acquiring shares of stock as new capital, as to which, when he sold them, he had to

account for the profits on the basis of their cost, which was the cost of the warrants, plus $30,050 cash paid when the stock was acquired."

It has already been shown that, as was recognized by the court below in the present case, the mere receipt of purchase certificates by a stockholder cannot on any theory constitute a dividend. The subject of the tax, if any, is the difference between the fair value of the stock and the amount paid for it upon the exercise of the right to purchase. In the *Cummings* case it was expressly held that this difference was not taxable. The decision is, therefore, a direct authority in favor of the view expressed by the Board of Tax Appeals and by the minority of the Circuit Court of Appeals in the case at bar.

This view is further confirmed by considering the converse of the situation now in question, *i.e.*, a case in which cash is paid to a stockholder who has conveyed property to the corporation. The classification of such a payment for income tax purposes depends upon the intent with which it was made; it will not be deemed a "distribution" if intended to constitute payment for the property conveyed, even though it is described in the corporate records as a dividend. In *Curran* v. *Commissioner* (C.C.A. 8) 49 F. (2d) 129, the court said (at p. 131):—

> "Under the evidence (fairly represented by the findings) the Board might have concluded either that there was a gift to the corporation and a real dividend or that there was a sale and a purchase payment which took the form of a dividend. Either view would have been substantially supported by the evidence and, therefore, not disturbed here. The Board found there was a sale. It finds that 'it was finally agreed that the corporation would pay and he would take $150,000.00

for the property. The petitioner then executed and delivered the deed to the property which was recorded October 13, 1920. No payment was made to the petitioner on account of the transfer of the property in 1920.' The findings following the quotation just made leave no doubt of the view of the Board that this 'dividend' for $150,000 declared January 15, 1921, was really in payment of this purchase price. In this connection there is a significant statement in the opinion of the Board on the findings as follows: 'We are convinced from all the evidence that the petitioner intended that the corporation should pay $150,000 for the property. We also believe that the petitioner was satisfied with the action as taken by the corporation in declaring and paying the dividend.' We think the findings must be construed as being that the property was sold to the corporation, and that payment therefor was through the medium of this 'dividend.' "

The Board of Tax Appeals, moreover, has consistently acted on the principle applied in *Helvering* v. *Bartlett* and *Commissioner* v. *Cummings*.

Van Vorst v. *Commissioner*, 22 B.T.A. 632.
Everhart v. *Commissioner*, 26 B.T.A. 318.
Powel v. *Commissioner*, 27 B.T.A. 55.
W. M. Ritter Lumber Co. v. *Commissioner*, 30 B.T.A. 231, 274.
Freshman v. *Commissioner*, 33 B.T.A. 394, 403-404.

That principle, the taxpayer submits, governs the case at bar.

2. The Finding of the Board of Tax Appeals as to the Value of the Stock in Question was conclusive.

Unless the fair market value of the stock when bought by the petitioner exceeded the prices paid by him, the transaction could not give rise to tax liability on any theory. The evidence before the Board of Tax Appeals consisted of a stipulation setting out a great variety of facts bearing on the question of value (R. 68-161). The Board was unable to find that there was in fact any excess of value and, indeed, made with respect to the first set of purchase certificates an affirmative finding that the value did not exceed the amount paid by the petitioner, *i.e.*, $25 per share (R. 170-171). Although the findings of the Board were in the nature of inferences drawn from the facts stipulated, these findings were no less binding on the Circuit Court of Appeals than they would have been if based on oral testimony.

Helvering v. *Rankin,* 295 U.S. 123.
General Utilities Co. v. *Helvering,* 296 U.S. 200.
Elmhurst Cemetery Co. v. *Commissioner,* 300 U.S. 37.
Johnson v. *Commissioner* (C.C.A. 8) 88 F. (2d) 952.

In the case last cited the court quoted with approval the following passage from the opinion in *Randolph* v. *Commissioner* (C.C.A. 8) 76 F. (2d) 472, 476:—

> "Even though the evidence before the Board is undisputed, the finding of the Board will not be disturbed by this court if different inferences may reasonably be drawn from such evidence."

It is true that the Circuit Court of Appeals was not concluded by the findings of the Board if these were wrong as matter of law. It is not, however, suggested that this

was the case; on the contrary, it appears that the Commissioner, in determining the tax liability of The American Superpower Corporation for 1929, fixed the fair market value of the shares of The United Corporation held by it in January, 1929, at $25 per share (R. 89, 167). It was proper, of course, to consider daily quotations of the rights on the Curb, but these quotations were to be weighed with all the other evidence and were of themselves indecisive, especially when the abnormal conditions which existed in 1929 are considered.

San Francisco National Bank v. *Dodge,* 197 U.S. 70.
Strong v. *Rogers* (C.C.A. 3) 72 F. (2d) 455.
Heiner v. *Crosby* (C.C.A. 3) 24 F. (2d) 191.

The majority of the Circuit Court of Appeals in this respect fell into the same error as that corrected by this court in *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U.S. 37, and assumed to make findings *de novo* substantially as upon an appeal in equity. Had the majority given proper weight to the findings of the Board, the result would have been in favor of the taxpayer regardless of whether there would have been a "dividend," if the price paid by him had been less than the fair value of the stock purchased. It follows that the judgment of the Circuit Court of Appeals must be reversed, apart from the question discussed in the previous section of this brief.

II.

If the Transactions constituted Dividends at all, the Value of the Stock is to be ascertained as of the Dates when it was actually purchased.

As noted above, the Circuit Court of Appeals for the Second Circuit in *Ramapo, Inc.,* v. *Commissioner,* 84 F.

(2d) 986, took the view that in a situation like the present each issue of purchase certificates constitutes the payment of a dividend and that the amount of this dividend is the sum for which the certificates could be sold in the market on the date of issue. In the case at bar it was held that the exercise of the right to purchase constituted the receipt of a dividend, so that the amount taxable was the difference between the sum paid and the market value of the stock at the date on which the option was exercised. The Commissioner asks that this ruling be reviewed, but it is apprehended that this is with a view to resolving the conflict between the two decisions rather than with any expectation that the position taken in the *Ramapo* case will be sustained.

The fundamental error in that view is the failure to consider the words of the statute:—"The term 'dividend' when used in this title . . . means any distribution made by a corporation to its shareholders." The mere granting of an option to buy from the corporation, even though readily salable, manifestly is not a "distribution," since it in no way reduces the corporation's assets.

Miles v. *Safe Deposit & Trust Co.*, 259 U.S. 247.

If a stockholder sells the option, he may be taxable for a gain, but not for a dividend, since nothing has been distributed to him. The only step which could on any theory be deemed a "distribution" is the transfer of stock to the holder of the option at a price less than the fair value. The principle is analogous to that upon which this court acted, in *Helvering* v. *San Joaquin Fruit & Investment Co.*, 297 U.S. 496; as was held in that case, one exercising an option to purchase land must be taken to "acquire" the land within the meaning of the Revenue Acts, not at the date of the option, but at the date of the conveyance. The principle is likewise similar to that whereby the cost basis of

property received by a remainderman under a trust is taken as the value at the date of actual distribution, not the value at the time of the life tenant's death.

Lane v. *Corwin* (C.C.A. 2) 63 F. (2d) 767.
Becker v. *Anchor Realty & Investment Co.* (C.C.A. 8) 71 F. (2d) 355.
Haskell v. *Commissioner* (C.C.A. 3) 78 F. (2d) 869.
Van Nostrand v. *United States* (D.C. Mass.) 18 F. Supp. 295.

It follows that the judgment of the Circuit Court of Appeals, in so far as it held that the mere issue of the purchase certificates did not constitute a "dividend," was right. Upon the taxpayer's view of the case, however, there was no dividend at any stage of the transaction, so that the point of difference between the respective Circuit Courts of Appeals is immaterial.

The taxpayer accordingly submits that upon the whole record the judgment of the Circuit Court of Appeals should be reversed and the decision of the Board of Tax Appeals affirmed.

Respectfully submitted,

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Counsel for BRADLEY W. PALMER.

In the Supreme Court of the United States

OCTOBER TERM 1936

No. 848

BRADLEY W. PALMER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT

We do not oppose the granting of a writ of certiorari in this case.

The court below held (1) that where a corporation issues to its stockholders rights to acquire from it shares which its owns in other corporations, at a price substantially less than the fair market value of such shares, and the rights are exercised, there is a taxable dividend to the stockholders; and (2) that the amount of the dividend so received is to be determined as of the dates when the stock rights were exercised.

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The decision on the first question is in accord with the decisions of two other Circuit Courts of Appeals which have passed upon the taxability of the same stock rights as are involved in the present case. *Ramapo, Inc.*, v. *Commissioner*, 84 F. (2d) 986 (C. C. A. 2d); *Commissioner* v. *Mayer*, 86 F. (2d) 593 (C. C. A. 7th) now pending on petition for certiorari, No. 862, present term. The result reached in these cases is also in accord with the decision in *Metcalf's Estate* v. *Commissioner*, 32 F. (2d) 192 (C. C. A. 2d), in which the rights were sold instead of being exercised. We do not concur in petitioner's contention that there is a conflict of decisions on this point. In *Helvering* v. *Bartlett*, 71 F. (2d) 598 (C. C. A. 4th), the corporation did not distribute to its stockholders rights to acquire shares which it owned, but acted as the agent of the stockholders for the acquisition of rights to purchase shares in another corporation at a bargain price. In *Commissioner* v. *Cummings*, 77 F. (2d) 670 (C. C. A. 5th), the taxpayer was not a stockholder but a purchaser of rights, and the rights were for the purchase of stock in the corporation itself; in addition, the question was whether stock had been held for more than two years within the capital net gains provisions. In *Taplin* v. *Commissioner*, 41 F. (2d) 454 (C. C. A. 6th), and *Commissioner* v. *Van Vorst*, 59 F. (2d) 677 (C. C. A. 9th), there was no *pro rata* distribution to stockholders such as would constitute a taxable dividend, but instead there was a sale to

a particular stockholder or group of stockholders. While we believe that the result reached by the court below is correct and that there are no conflicting decisions, we recognize the importance of the question and the fact that the reasoning of the courts has not been wholly consistent.

The decision of the court below on the second question noted above is in direct conflict with the decision on that issue in the *Ramapo* case, *supra*. In the latter case, the Circuit Court of Appeals for the Second Circuit held that the date of receipt of the rights by the stockholders should be taken in determining the value of the dividend received. We believe that on this issue the decision in the *Ramapo* case is sound, and, accordingly, we plan to file a petition for certiorari in the present case on the question of the proper date as of which value should be determined. Consequently it is believed that the Court may wish to have before it the entire case even though on the question raised by the petitioner herein there is no conflict of decisions.

Respectfully submitted.

STANLEY REED,
Solicitor General.

APRIL 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 19

BRADLEY W. PALMER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 59

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BRADLEY W. PALMER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE COMMISSIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 155–170) is reported in 32 B. T. A. 550. The opinion of the Circuit Court of Appeals (R. 187–197) is reported in 88 F. (2d) 559.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 12, 1937. (R. 197.) The petition for a writ of certiorari in No. 19 was filed March 31, 1937, and granted May 17, 1937. (R. 197, 198.) The petition in No. 59 was filed May 12, 1937, and granted June 1, 1937. (R. 198.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

No. 19

Where a corporation issues to its stockholders rights to acquire from it shares of stock which it owns in other corporations, at a price substantially less than the fair market value of such shares, and the rights are exercised, does the transaction constitute a taxable dividend to the stockholders?

No. 59

The court below held that the transaction constituted a taxable dividend to the stockholders, and the question presented in the Commissioner's petition is: As of what date should the stock or rights be valued for the purpose of determining the amount of the dividend?

STATUTE INVOLVED

The Revenue Act of 1928, c. 852, 45 Stat. 791, provides in part as follows:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
>
> * * * * *
>
> SEC. 115. DISTRIBUTIONS BY CORPORATIONS.
>
> (a) *Definition of dividend.*—The term "dividend" when used in this title (except in section 203 (a) (4) and section 208 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.
>
> (b) *Source of distributions.*—For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in

value of property accrued, before March 1, 1913, may be distributed exempt from tax, after the earnings and profits accumulated after February 28, 1913, have been distributed, but any such tax-free distribution shall be applied against and reduce the basis of the stock provided in section 113.

* * * * *

STATEMENT

The facts are set forth in a stipulation (R. 64–155) agreed upon between the parties and adopted by the Board as its findings (R. 170). The material facts may be summarized as follows:

On January 1, 1929, the taxpayer was the owner of 6,396 shares of common stock of the American Superpower Corporation (hereinafter referred to as Superpower), which were acquired on and after September 22, 1927. On June 10, 1929, he acquired four additional shares, making a total of 6,400 shares of Superpower stock held by him on June 10, 1929. On or about June 11, 1929, the common stock of Superpower was split up five for one, and taxpayer received 32,000 shares of new common stock in exchange for the 6,400 shares originally held by him. (R. 65.)

Superpower, a Delaware corporation, was organized in 1923, and at the beginning of 1929 its assets consisted principally of preferred and common stocks of domestic corporations. Among its assets were 800,000 shares of common stock of Public Service Corporation of New Jersey, and 53,000

shares of common stock of the United Gas Improvement Company. (R. 74.) On January 7, 1929, the United Corporation (hereinafter referred to as United) was organized as a holding corporation in order to pool the interests of certain minority stockholders of the Public Service Corporation of New Jersey, the United Gas Improvement Company, and Mohawk & Hudson Power Corporation. Superpower was a participant therein, and in connection therewith disposed of its holdings of common stock of the Public Service Corporation of New Jersey, and the United Gas Improvement Company, and received in exchange certain securities of United, including 2,210,853 shares of its common stock. (R. 65, 75–77.)

On January 23, 1929, the board of directors of Superpower approved a plan for distributing a portion of Superpower's holdings of United stock to its stockholders. By resolutions then adopted, all of its stockholders of record on January 26, 1929, were given the right to acquire from Superpower, at $25 per share, one-half share of United stock for each share of Superpower stock. The same resolutions approved forms of certificates to evidence such rights and authorized arrangements for the preparation and mailing of such certificates and for the transfer and delivery to the stockholders of the requisite number of shares of United stock, upon their surrendering the certificates and making the payments as therein provided. The board also approved a proposed form of public announcement

and, under date of January 24, 1929, the stockholders were notified of the action taken by the board, such notice being received by the taxpayer on January 25, 1929. In this announcement, the stockholders were notified that certificates evidencing the rights were to be mailed on or about February 1, 1929. (R. 13–17, 66.)

On January 31, 1929, certificates dated February 1, 1929, were mailed by Superpower to all of its stockholders of record on January 26, 1929. The taxpayer on February 1, 1929, received his certificates which recited that he, as the holder of 6,396 shares of Superpower stock, was entitled to acquire from the corporation 3,198 shares of United stock at a price of $25 per share. On February 15, 1929, the taxpayer paid to Superpower the sum of $79,950, surrendered the certificates and received 3,198 shares of United stock. (R. 66–67.)

On January 26, 1929, the number of shares of common stock of Superpower outstanding was 1,642,944; and the number of rights issued was 1,642,944. Starting on January 25, 1929, the above mentioned rights were dealt in on the New York Curb Exchange and ranged from a low of 11⅝ on January 25th to a high of 21 on January 30th, and to a low of 12⅜ on February 15th. On January 26th, the date named for determining the stockholders of record who were entitled to receive the rights, they sold on the market for a high of 12⅞

and a low of 12⅛. And on February 1, 1929, the date the taxpayer received his certificates evidencing the rights, they sold for a high of 18 and a low of 16¼. (R. 67.)

On January 29, 30 and 31, 1929, Superpower sold substantial blocks of United common stock at prices ranging from $56.96 to $63.46. (R. 83–84.)

The Commissioner of Internal Revenue determined that the rights so issued by Superpower represented the distribution of taxable dividends, and determined the amount thereof to be the fair market value of such rights on January 26, 1929, namely, $12.50 per right, and included in respondent's gross income, as dividends, the amount of $79,950 on account thereof. (R. 68.)

On May 1, 1929, similar action was taken by the directors of Superpower with respect of further holdings of United common stock, the stockholders of record on May 8, 1929, being given the right to acquire United stock at $30 per share and at the rate of one share of United for each four shares of Superpower stock. On May 2, 1929, the stockholders were notified of the action of the directors, such notice being received by the taxpayer on May 3, 1929. In this announcement, the stockholders were advised that certificates evidencing the rights were to be mailed on or about May 8, 1929. (R. 23–24, 68.)

On May 13, 1929, the taxpayer received from Superpower a communication mailed May 12, 1929,

and dated May 8, 1929, enclosing a certificate which recited that he, as the holder of 6,396 shares of Superpower common stock was entitled to acquire from the corporation 1,599 shares of United stock at a price of $30 per share. On May 24, 1929, the taxpayer paid to Superpower the sum of $47,970 in cash, surrendered the certificate and received 1,599 shares of United stock. (R. 68–69.)

On May 8, 1929, the number of shares of common stock of Superpower outstanding was 1,643,216, and the number of rights issued was 1,643,216. Starting on May 2, 1929, the rights were dealt in on the New York Curb Exchange and ranged from a low of 6⅛ on May 2nd to a high of 11⅜ on May 11th. On May 8, 1929, the date named for determining the stockholders of record who were entitled to receive the rights, they sold on the market for a high of 8⅞ and a low of 8⅜. On May 13th, the date the taxpayer received his certificate evidencing the rights, they sold for a high of 10⅝ and a low of 9¼. (R. 69–70.) The Commissioner of Internal Revenue determined that the rights so issued by Superpower represented the distribution of taxable dividends and determined the amount thereof to be the fair market value of such rights on May 8, 1929, namely, $8.625 per right, and included in taxpayer's gross income as dividends the amount of $55,165.50 on account thereof. (R. 70.)

Prior to June 18, 1929, Superpower acquired certain shares of common stock of the Common-

wealth and Southern Corporation (hereinafter referred to as Commonwealth), a corporation organized under the laws of Delaware on May 23, 1929. On June 5, 1929, the board of directors of Superpower adopted certain resolutions, pursuant to which its common stockholders of record, on June 18, 1929, were given the right to purchase from the corporation one share of Commonwealth stock for each 10 shares of Superpower common stock. On June 5, 1929, the stockholders of Superpower were notified of the action of the directors, such notice being received by the taxpayer on or about June 6, 1929. In this announcement, the stockholders were advised that certificates evidencing such rights were to be mailed on or about June 22, 1929. (R. 30–31, 70–71.) On June 23, 1929, taxpayer received a letter from Superpower, dated and mailed June 22, 1929, enclosing a certificate which recited that he, as a holder of 32,000 shares of Superpower stock, was entitled to acquire from the corporation 3,200 shares of Commonwealth stock at a price of $15 per share. On July 2, 1929, the taxpayer paid to Superpower the sum of $48,000 in cash, surrendered the certificate, and received from the corporation 3,200 shares of Commonwealth stock. On June 18, 1929, the number of shares of common stock of Superpower outstanding was 8,242,310, and the number of rights issued was 8,242,310. (R. 71–72.)

Starting on June 6, 1929, such rights were dealt in on the New York Curb Exchange and ranged from a low of 11/16 on June 18th to a high of 1-15/16 on June 29th. On June 18, 1929, the date named for determining the stockholders of record who were entitled to receive the rights, they sold on the market for a high of ⅞ and a low of 11/16; and on June 24, 1929 (June 23, 1929, being a Sunday), they sold for a high of ⅞ and a low of ¾. (R. 72.)

The Commissioner of Internal Revenue determined that the rights so issued by Superpower represented a distribution of taxable dividends, and determined the amount thereof to be the fair market value of such rights on June 18, 1929, namely, $0.78125 per right, and included in taxpayer's gross income as a dividend the sum of $25,000 on account thereof. (R. 73.)

The Board of Tax Appeals held that the above transactions, whereby Superpower granted to its stockholders rights to purchase United and Commonwealth stock, did not represent distributions of taxable dividends and disallowed the deficiency based thereon. (R. 156–170, 174.) Upon appeal, the court below reversed the Board, holding that the transactions did represent the distribution of taxable dividends. The court further held that the amount of the dividend should be determined by valuing the stock as of the dates the rights were exercised. (R. 187–193.)

SPECIFICATION OF ERRORS TO BE URGED IN NO. 59 ON BEHALF OF THE COMMISSIONER

The Circuit Court of Appeals erred:

1. In holding that for the purpose of determining the amount of the dividend the stock or rights should be valued as of the dates the rights were exercised.

2. In failing to hold that for the purpose of determining the amount of the dividend the stock or rights should be valued as of the date the rights were received by the taxpayer.

3. In the alternative, in failing to hold that, for the purpose of determining the amount of the dividend, the stock or rights should be valued as of the record dates or the dates when the rights were receivable by the taxpayer.

SUMMARY OF ARGUMENT

1. It is well settled that where a corporation issues to its stockholders rights to subscribe to its own stock of the same class as that held by the stockholders, the receipt of such rights does not constitute a taxable dividend. But there is a clear distinction between rights issued to a stockholder entitling him to acquire like stock in the issuing corporation and rights entitling him to acquire *assets* of the corporation, which assets consist of stock in another corporation. In the former case, the corporation parts with nothing, while in the latter case the corporation parts with a portion of its assets.

The law on the subject of dividends has been considered many times by this Court, and the rule which may be drawn from the various cases is that any distribution to stockholders of a portion of the assets of a corporation is a dividend, whether such assets consist of cash, stock of another corporation, or other property. By the same token the distribution to a stockholder of a valuable right to acquire such property at a price substantially less than its fair market value is likewise a dividend. If the distribution to a stockholder of a share of stock in another corporation, worth $50, is a $50 dividend, the distribution of a right permitting the stockholder to acquire the same share of stock upon payment of $25 is a $25 dividend to the stockholder. That precisely is the present case. The fact that the corporate resolutions did not refer to the distribution of the rights as dividends is immaterial.

The instant case is ruled by *Peabody* v. *Eisner,* 247 U. S. 347; *Ramapo, Inc.* v. *Commissioner,* 84 F. (2d) 986 (C. C. A. 2d); and *Metcalf's Estate* v. *Commissioner,* 32 F. (2d) 192 (C. C. A. 2d). It is distinguishable from *Helvering* v. *Bartlett,* 71 F. (2d) 598 (C. C. A. 4th); *Commissioner* v. *Cummings,* 77 F. (2d) 670 (C. C. A. 5th); *Taplin* v. *Commissioner,* 41 F. (2d) 454 (C. C. A. 6th); and *Commissioner* v. *Van Vorst,* 59 F. (2d) 677 (C. C. A. 9th).

2. The taxpayer contends that the Board made a finding that the fair market value of United stock in January, 1929, was $25 per share. It is

our position that the statement in the body of the opinion of the Board which the taxpayer relies upon as being a finding is merely an argument used by the Board in support of its conclusion. Moreover, if it be deemed a finding of fact it is not supported by any substantial evidence.

3. The Commissioner, in asserting the deficiency, determined the amount of the dividend by valuing the rights as of the dates named in the corporate resolutions for determining the stockholders of record entitled to receive the rights. The court below held that the amount of the dividends should be determined by valuing the United stock as of the dates the rights were exercised. It is our position that the rights should be valued as of the dates they were received by the taxpayer, since at that time the rights or shares of stock became unqualifiedly subject to his demand.

ARGUMENT

I

THE DISTRIBUTION OF THE RIGHTS TO PURCHASE UNITED AND COMMONWEALTH STOCK CONSTITUTED A DIVIDEND WITHIN THE MEANING OF SECTION 115 OF THE REVENUE ACT OF 1928

Section 115 (a) of the Revenue Act of 1928 defines a dividend as "any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913." The question here presented is whether Superpower dis-

tributed "other property" to its stockholders pursuant to the resolutions of January 23, May 1, and June 5, 1929.[1]

The facts with respect to the three issues of rights are essentially the same. The discussion here will be confined largely to those issued in January.

In January, 1929, Superpower was the owner of 2,210,853 shares of stock of the United Corporation, and in order to effect a distribution of a portion of such stock to its stockholders, its board of directors adopted certain resolutions, pursuant

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[1] The question of the amount of accumulated earnings or profits available for dividends by Superpower is not here presented or contested. Neither the Board, which held for other reasons that there was no dividend (R. 163 ff.), nor the court below, which reversed the Board and remanded the case for further proceedings not inconsistent with its opinion (R. 197), passed upon the question. And the question is not raised by taxpayer's specification of errors. (Brief for Bradley W. Palmer, p. 13.)

In arriving at the deficiency here involved the Commissioner determined that when the distributions were made Superpower had earnings and profits accumulated after February 28, 1913, equal to or in excess of the respective amounts of such distributions as determined by him. (R. 85.)

It may be noted that in the companion case of *Oscar F. Mayer* v. *Guy T. Helvering*, No. 22, present term, which presents the same general questions as the instant case, it is expressly stipulated that taxpayer does not question the Commissioner's determination that Superpower had earnings and profits accumulated after February 28, 1913, equal to or in excess of the fair market value of the rights received by Superpower's stockholders. (See the record in the *Mayer* case at p. 15; cf. the record here at pp. 85, 87–90.)

to which its stockholders were given the right to acquire United stock at a price of $25 per share, and at the rate of one share of United for each two shares of Superpower stock. On January 26th, the date named for determining the stockholders of record who were entitled to the rights, the fair market value of United stock was approximately $50 per share.[2] (R. 67), and on January 31st it was approximately $60 per share (R. 84). To evidence the rights in tangible form, as well as to give them a readily marketable character, transferable certificates of the rights granted by the resolutions were distributed to the stockholders of Superpower. Taxpayer received his certificate on February 1st. (R. 66.) On or about February 15, 1929, all of such certificates were surrendered to the corporation, together with cash payments aggregating $20,536,800, and the stockholders received 821,772 shares of United stock worth between $41,000,000 and $50,000,000. We submit that in substance and

[2] The figure of approximately $50 per share as the fair market value of United stock on January 26th is derived from the New York Curb Exchange quotations on that date for the rights to buy United stock from Superpower. On January 26th the rights sold from a high of $12⅞ to a low of $12⅛. Thus the two rights necessary for the acquisition of one share of United stock from Superpower at $25 per share could be bought for approximately $25. Of course, $25, the fair market value of two rights, approximates the difference between the fair market value of United stock and $25, the warrant price for United stock. Thus the fair market value of United stock on January 26th was approximately $50 per share.

legal effect Superpower had distributed to its stockholders a taxable dividend to the extent of the fair market value of the rights.

The subject of dividends has been considered many times by this Court. In *Towne* v. *Eisner,* 245 U. S. 418, it was held that a stock dividend in common stock paid to holders of common stock does not constitute a taxable dividend to the recipients under the Revenue Act of 1913. *Eisner* v. *Macomber,* 252 U. S. 189, decided that such a dividend did not constitute income to the stockholders within the meaning of the Sixteenth Amendment. Accordingly, in *Miles* v. *Safe Deposit Co.,* 259 U. S. 247, it was held that when a corporation issues to its stockholders rights to acquire stock in the issuing corporation of the same class as that held by the stockholders, the receipt of such rights by the stockholders is "essentially analogous to a stock dividend" (p. 252) and not taxable.

Very shortly after the decision in the *Towne* case, the Court decided *Peabody* v. *Eisner,* 247 U. S. 347. In that case the Union Pacific Railroad Company declared a dividend, partly in cash and partly in stock of the Baltimore & Ohio Railroad Company. Tax was exacted against this dividend and it was contended that the *Towne* case controlled. In rejecting this contention, the Court said in part (p. 349–350):

> It hardly is necessary to say that this case is not ruled by our decision in *Towne* v. *Eisner,* since the dividend of Baltimore &

> Ohio shares was not a stock dividend but a distribution *in specie* of a portion of the assets of the Union Pacific, and is to be governed for all present purposes by the same rule applicable to the distribution of a like value in money. * * *

The doctrine of the *Peabody* case was reaffirmed in *United States* v. *Phellis,* 257 U. S. 156; *Rockefeller* v. *United States,* 257 U. S. 176, and *Marr* v. *United States,* 268 U. S. 536.

Thus there is a clear distinction in the cases between a distribution of a corporation's own stock to stockholders of the same class as the stock distributed, and the distribution by a corporation of a portion of its assets consisting of stock owned in another corporation. In the former case, the corporation parts with nothing (*Towne* v. *Eisner, supra,* p. 426) while in the latter case the corporation parts with a portion of its assets. So, too, there is the same distinction between a distribution by a corporation to its stockholders of rights to acquire from the corporation its stock, of the same class as that held by the stockholders, and the distribution by a corporation to its stockholders of rights to acquire from the corporation a portion of its assets, consisting of stock owned in another corporation, at a price substantially less than its fair market value. Under the principle of *Peabody* v. *Eisner, supra,* many times reaffirmed by this Court, there can be little question that an outright distribution of United stock by Superpower to its stock-

holders in the latter part of January would have constituted a dividend to them of $50 on each share of United distributed. By the same token, if the distribution to a stockholder of a share of stock of another corporation worth $50, is a $50 dividend, then the distribution of a right permitting the stockholder to acquire the same share of stock upon payment of $25 is a $25 dividend. That precisely is the present case.

Before issuance of the rights, Superpower held certain assets consisting of shares of United stock worth $50 per share. By issuing the rights, Superpower, in effect, carved out marketable interests in the United shares, consisting of irrevocable options in its stockholders to acquire the United shares from Superpower at $25 per share. These interests in the United shares Superpower disposed of to its stockholders by distribution of the certificates representing the interests. Thus Superpower parted with, and the stockholders received, an undoubtedly valuable portion of its assets.

Insofar as *Helvering* v. *San Joaquin Co.*, 297 U. S. 496, relied on by the taxpayer at page 32 of his brief, tends to support the proposition that the taxpayer did not acquire the shares of United until exercise of the rights granted, we need not quarrel with it. It is our contention that the taxpayer, irrespective of the exercise of rights and acquisition of the shares of United, received valuable interests in the United shares upon distribution of the rights. But even if the rights distrib-

uted did not constitute interests in the United shares held by Superpower,[3] nevertheless there was a dividend to the stockholders. Prior to the issuance of the rights, Superpower, as owner of the United shares, had the right to dispose of those shares and realize their fair market value. Cf. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 582. By issuing the rights, Superpower for a definite period of time relinquished to its stockholders its right to realize so much of the fair market value of the United stock held as exceeded $25 per share. Cf. *Helvering* v. *Salvage,* 297 U. S. 106; *Wilson* v. *Bowers,* 57 F. (2d) 682 (C. C. A. 2d). The right so relinquished by Superpower and received by its stockholders was a property right of substantial value (R. 67). See *Helvering* v. *San Joaquin Co., supra,* p. 498, that "The option itself was property, and doubtless was valuable." So the stockholders of Superpower received a dividend of a portion of Superpower's assets, consisting of the transfer-

[3] Although there is no holding on the point, it is stated in *Helvering* v. *San Joaquin Co., supra,* p. 498, that "the weight of authority is to the contrary" of the proposition that an option to purchase real estate constitutes an interest in the real estate in the nature of a covenant real. The situation here involved is quite remote from the technical considerations of real property law, and we do not believe the statement of the Court in the *San Joaquin* case to be applicable here. Moreover, there is here the fact, not present in the *San Joaquin* case, that the shares subject to the rights distributed were put out of the control of Superpower and delivered to the transfer agents of United and Commonwealth to meet the exercise of the rights. (R. 66, 68, 71.)

able right to realize the fair market value of the United shares in excess of $25 per share.

That the cost to Superpower for the United shares was less than $25, the price to stockholders under the rights issued, is immaterial. The fact that Superpower for the purpose of its income tax liability realized a profit on disposition of the United shares to its stockholders at $25 per share, does not negative the paying of a dividend upon distribution of the rights, but merely indicates that the dividend paid was not as large as it might have been. Superpower might have distributed rights to buy United shares at the cost of the shares to Superpower, in which case there would have been no taxable profit to Superpower, and presumably a larger dividend to the stockholders. But so far as the present question is concerned, the hypothetical transaction, and the transactions here involved, would be in substance the same.

Nor is the fact that the corporate resolutions did not specifically refer to the distribution of the rights as a dividend controlling. *Chattanooga Sav. Bank* v. *Brewer,* 17 F. (2d) 79 (C. C. A. 6th), certiorari denied, 274 U. S. 751; *Spencer* v. *Lowe,* 198 Fed. 961 (C. C. A. 8th). The courts have uniformly held that the substance and not the form is what controls (*Eisner* v. *Macomber, supra*) and have never hesitated to hold that what purported to be a sale was actually a distribution of corporate assets. *Continental Co.* v. *United States,* 259 U. S.

156. This case involved rights similar to those under consideration here and this Court held that the transaction constituted a distribution of surplus even though it was denominated a sale. The Court said in part (p. 176):

> They all, under the plan, will receive the benefit of the difference between the real value of the privilege of disposing of their distributive certificates of interest in stock in the new Coal Company, and the payment of $2.00 or such other sum as may be fixed, per share held by them of the Reading Company stock. Such difference has already been the subject of sale and quotation on the market in New York and has varied from $11 to $20. * * * The disparity shows that while the transfer of certificates of interest in the new Coal Company stock is denominated a sale, it is only a *distribution of the surplus or assets of the Reading Company to its stockholders* * * *. [Italics supplied.]

See also *Venner* v. *Southern Pac. Co.*, 279 Fed. 832, 843 (C. C. A. 2nd), certiorari denied, 258 U. S. 628.

A case similar in all respects to the instant one is *Metcalf's Estate* v. *Commissioner*, 32 F. (2d) 192 (C. C. A. 2d). In that case the Southern Pacific Company organized Pacific Oil Company and subscribed for all its stock at $15 per share. The oil company then purchased the oil properties of the Southern Pacific Company at a price which was far below the fair market value of the prop-

erties. The Southern Pacific Company then issued to its stockholders rights to purchase at $15 per share one share of the oil company stock for each share of Southern Pacific Company stock owned by them, and such rights were immediately dealt in upon the New York Stock Exchange.

The Metcalf Estate at the time the rights were issued owned 1,000 shares of Southern Pacific stock and accordingly received 1,000 rights, which it sold for $18,000 and after deducting expenses of the sale it received the net sum of $17,805. Before the Board, the Estate contended that the rights should be taxed in accordance with the principle laid down in *Miles* v. *Safe Deposit Co., supra.* In rejecting this contention, the Board said (13 B. T. A. 236, 237):

> In 1921 the Southern Pacific Co. was the owner of all the capital stock of the Pacific Oil Co. In that year it paid a dividend in the form of a right to purchase stock of the Pacific Oil Co. at the price of $15 per share, which right had a fair market value on the date of its receipt of $18 per share. The value of the rights received by the petitioner should have been returned as an ordinary dividend taxable only at surtax rates. *Peabody* v. *Eisner,* 247 U. S. 347. The subsequent sale or other disposition of the property received by way of a dividend would give rise to gain or loss, dependent upon the amount received therefor. In this case petitioner is entitled to deduction of the difference between $18,000

> and $17,805. The tax for 1921 should accordingly be recomputed by including the $18,000 dividends in income as subject to surtax only, and by the allowance of the deduction of $195.

It will be observed that the Board definitely rejected the theory which it adopted in the instant case. The Board held that the receipt of the rights constituted property dividends of a value of $18,000, subject to surtax only, and that upon the sale thereof the net realization of $17,805 resulted in a deductible loss (for both normal and surtax purposes) of $195.

Upon appeal, the Estate's brief was all written under a single point headed, "The issuance of the rights was not a dividend", and the Commissioner briefed it under the heading, "Rights accruing to a stockholder in a corporation to purchase stock in another corporation at less than the actual value of the stock are equivalent to dividends and taxable as income." Thus the question presented to the court was whether the issuance of the rights constituted a taxable dividend, and the court stated that it did, saying (p. 194):

> Thus, where a stockholder receives a distribution of the assets of a corporation in cash or in stock of a different enterprise, such distribution is for taxing purposes a dividend. *No sound distinction can be drawn between a distribution of stock of another corporation and one of valuable*

> *rights to purchase such stock.* Each may be sold at its selling price. The rights this petitioner sold netted $18 per right. They amounted to a distribution of assets of the company of which it was a stockholder, just as much as an actual distribution of stock of the Baltimore & Ohio Railroad by the Union Pacific Company did in the Peabody Case. *There was a distribution in specie of a portion of the assets of the Southern Pacific Company.* A distribution of earnings or assets of a corporation is a distribution, whether or not so determined. [Italics supplied.]

The only difference between the *Metcalf* case and the instant one is that in the former the rights were sold, whereas here they were exercised. But it seems clear in the above quotation that the decision would have been the same had the rights been sold or exercised.[4]

As shown above, the Board of Tax Appeals has not been consistent in its decisions on the subject. In *Duke* v. *Commissioner*, 18 B. T. A. 374, the

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[4] The court in the *Metcalf* case states in one part of its opinion (p. 193) that "The question presented is whether, by the selling of these rights, the petitioner received taxable income * * *." This was natural in view of the fact that the fair market value of the rights upon receipt by the estate was the same as the price received by the estate upon sale of the rights. But it is clear from the court's opinion as a whole that the court agreed with the Board that the receipt of the rights, apart from their sale, constituted a dividend amounting to the fair market value of the rights upon receipt by the estate.

stockholders of the American Tobacco Company were in 1912 given the right to subscribe, share for share, to stock of the P. Lorillard Company at $100 per share. The taxpayer, as the owner of 378 shares of American Company stock, exercised the rights, paid the sum of $37,800, and received 378 shares of Lorillard stock. The rights at the time of their receipt by the taxpayer had a market value of $80 per right. In 1920, the taxpayer sold the Lorillard stock at $127 per share and claimed a loss based upon a cost basis of $180 per share ($100 plus $80, the value of the right when received in 1912). The Commissioner disallowed the loss and computed a profit based upon a cost of $100 per share. Upon appeal to the Board of Tax Appeals, the taxpayer's contention was sustained, the Board saying (p. 376):

> *The right to purchase stock in the newly organized P. Lorillard Co. granted to shareholders in the American Tobacco Co. was in the nature of a dividend which, had it occurred in a taxable year, would have been taxable. Edwin P. Metcalf,* 13 B. T. A. 236. That these rights were valuable appears from the quoted market price of $80. Looking at the transaction broadly, the consideration paid for the stock was $100 cash plus the surrender or exercise of a right. By such surrender of one of these rights and the payment of $100 petitioner acquired property (a share of stock) worth $180 on the market. The purchase of a share of stock

> by one not possessing a right could have been accomplished only by paying $180 on the open market. Therefore, when petitioner exercised the right previously issued her, she merely converted property worth $80 into another form. It follows that the cost to petitioner of the stock in P. Lorillard Co. was $100 in cash plus the surrender of a right worth $80, or a total cost of $180. [Italics supplied.]

In line with the principle enunciated in the *Metcalf* and *Duke* cases is *Morris Run Coal Mining Co.* v. *Phillips,* 7 F. Supp. 730, 732 (M. D. Pa.), where rights issued by the Lehigh Valley *Railroad* Company to purchase stock in the Lehigh Valley *Coal* Company were held to be dividend distributions.

The same question involving the same rights as are under consideration here was passed upon by the Second Circuit in *Ramapo, Inc.* v. *Commissioner,* 84 F. (2d) 986, and by the Seventh Circuit in *Commissioner* v. *Mayer,* 86 F. (2d) 593, now pending on writ of certiorari under the title, *Mayer* v. *Helvering,* No. 22, present term. In both cases the court was of the opinion that the taxpayers had received taxable dividends. In the *Ramapo* case the court said (pp. 987–988):

> But, if the rights are to purchase stock in another corporation at less than its fair market value, the issuance of them is a distribution of corporate assets in the amount by which the value of the stock exceeds the

> price to be paid for it, and, if such excess represents earnings or surplus, is a dividend. This would appear to be self-evident. * * * Of course, if full value is paid for the stock no dividend is received by the shareholder. The controlling issue, therefore, in passing upon the correctness of the Board's decision, is whether the shareholders of Superpower were given rights to purchase the stock of the United Corporation and the Commonwealth & Southern Corporation at less than its fair market value; for, if they were, to the extent that the value of the stock exceeded the price payable, they received a distribution of property which was a dividend, * * *. Such distribution was therefore a dividend.
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> * * * * *

The taxpayer cites and relies principally upon *Helvering* v. *Bartlett*, 71 F. (2d) 598 (C. C. A. 4th); *Commissioner* v. *Cummings*, 77 F. (2d) 670 (C. C. A. 5th); *Taplin* v. *Commissioner*, 41 F. (2d) 454 (C. C. A. 6th); and *Commissioner* v. *Van Vorst*, 59 F. (2d) 677 (C. C. A. 9th). But such cases are readily distinguishable from the instant one. The *Bartlett* case turned entirely on a question of fact as to whether the corporation distributed the rights to its stockholders or whether it acquired them as their agent. The facts were succinctly set forth in the opinion of the Board of Tax Appeals (28 B. T. A. 285), as follows (p. 288):

> The facts of the instant case are different from those of the cases cited by the respond-

> ent [*Peabody, Phellis, Rockefeller* and *Metcalf* cases]. Here the Guaranty Co. *acted as agent* for the Fire Co. in distributing 25,000 shares of the latter's stock to stockholders of the former. It subscribed for 25,000 shares on its own account and for 25,000 which were to be taken by its stockholders at the subscription price. *It never received certificates for the latter 25,000 shares and it never owned them.* Payment was made therefor only after the money had been collected from the subscribers. Surplus of the Guaranty Co. was in no way affected by the transaction and it received no benefit from the subscription price, which was immediately paid over to the Fire Co. [Italics supplied.]

The distinction between that case and the case at bar is obvious. The Guaranty Company never owned the stock of the Fire Company, which was distributed, as did Superpower in the instant case. As stated in the opinion of the Circuit Court of Appeals (p. 600):

> All that the *Guaranty* Company did was to acquire *in behalf of its stockholders* options to subscribe to stock in the Fire Company and to allot these options to them in accordance with their holdings; * * * [Italics supplied.]

The Guaranty Company, acting as agent for its stockholders, collected the subscription price and turned it over to the Fire Company, and the Fire

Company issued its stock directly to the subscribing stockholders. The Guaranty Company was never anything more than an intermediary in obtaining from its stockholders subscriptions to the stock. The transaction did not result in the distribution of any assets belonging to the Guaranty Company for the very good reason that the latter company never owned the distributed stock, as did Superpower in the present case.

In the *Cummings* case, *supra,* the taxpayer did not acquire rights as a stockholder but purchased in 1925 option warrants entitling him to acquire at a certain price stock of the Southeastern Power & Light Company. In June, 1929, he exercised the warrants and thus acquired a certain number of shares of stock, a portion of which he later in the same year sold at a profit. The sole question presented was whether any portion of the profit was taxable as a capital net gain—that is, whether any portion of the stock had been held for over two years as required by the statute. The court held that the holding period of the warrants should be tacked to the holding period of the stock, and thus permitted a portion of the profit to be taxed at capital net gain rates. The facts of the case have nothing in common with those in the instant case and the question presented was not related to that presented here. It is evident that the case does not support the taxpayer's contention.

In the *Taplin* case, *supra,* a corporation transferred to three of its stockholders who owned approximately 68 per cent of its stock, shares of stock in another corporation, of the value of $30 per share, for a price of $7 per share. In the *Van Vorst* case, *supra,* a corporation sold to its principal stockholder, who owned approximately 93 per cent of its outstanding capital stock, real estate of the fair market value of $154,000 for a consideration of $54,000. In both cases the courts held that the difference between the purchase price and the fair market value did not represent a taxable dividend. It will be observed that in neither of these cases was there a distribution by the corporation to the stockholders, because they were stockholders and in proportion to their respective holdings. In both cases there was a mere sale to a particular stockholder or group of stockholders, with no equivalent rights distributed or offered to the remaining stockholders, and the tax liability claimed by the Commissioner was predicated entirely on the inadequacy of the sales price. In each case there were valid reasons for effecting a sale, a *bona fide* intent to enter into an ordinary sale transaction, and no evidence whatever of any intent to effect a *pro rata* distribution of assets among stockholders. Neither decision is in any manner contrary to the decisions in the *Metcalf* and *Duke* cases, *supra,* and neither has any application to the facts in the instant case.

We submit that the instant case is clearly distinguishable from the cases relied upon by the taxpayer. Here, the directors of Superpower, the proper authority to declare dividends, dealt with the stockholders as a class, not as individuals, and distributed *pro rata* among such stockholders valuable rights which each stockholder could sell on the market or exercise, as he might choose. The transaction was carried out in such a manner that it cannot possibly be denominated a mere sale by Superpower and a purchase by the stockholders. The rule that taxable income does not ordinarily flow to a taxpayer by reason of a purchase has no application to the facts in the instant case, for here, by proper corporate action, the stockholders of Superpower received, as a fruit of their stock ownership, valuable property rights pertaining to a portion of the assets of the corporation.

II

THE STIPULATED FACTS WHICH WERE ADOPTED BY THE BOARD AS ITS FINDINGS CONCLUSIVELY SHOW THAT THE SUBSCRIPTION PRICES UNDER THE RIGHTS WERE MATERIALLY LESS THAN THE MARKET VALUE OF THE STOCK

The taxpayer contends that the Board made a finding of fact that the fair market value of United stock in January, 1929, was $25 per share and that the court below disregarded that finding. The Board in its opinion said (R. 164).:

> No valid argument can be made that Superpower intended to distribute to its stock-

> holders any portion of its assets by selling 821,472 common shares of United to them at a fair market value. Upon the sale of the stock at $25 per share Superpower realized a profit of $16.05 on each share. That $25 was a fair market price for the stock in January 1929 is further evidenced by the fact that J. P. Morgan & Co. and Bonbright & Co., pursuant to the agreement made between the interested parties, each subscribed for and purchased from United 400,000 shares of its common stock at $22.50 per share.

Taxpayer argues that this is a finding of fact and that if it is supported by substantial evidence it must be accepted by the Circuit Court of Appeals. It is our position that the above is not a finding of fact, but is merely an argument used by the Board to support its conclusion that the several transactions did not represent the distribution of taxable dividends. The Board expressly adopted the stipulated facts as its findings. (R. 170.) But if the statement be accorded the dignity of a finding, we submit that it is not supported by any substantial evidence.

The January rights entitled the holders to purchase United common at $25 per share and at the rate of one share of United for each two shares of Superpower. These rights were extensively dealt in on the New York Curb Exchange at prices ranging from 11⅝ to 21 per right, or from $23 to $42 for the two rights required to obtain one share.

(R. 67.) Between January 29 and January 31, 1929, Superpower sold on the market 9,279 shares of United stock at prices ranging from $56.96 to $63.46 per share. (R. 84.) The rights were mailed by Superpower to its stockholders on January 31, 1929, and were received by the taxpayer on February 1, 1929. (R. 66.) On the latter date the rights sold on the Curb market at prices ranging from 16¼ to 18 per right, or from $32.50 to $36 for the two rights required to obtain one share. Add to these prices the $25 which was payable to Superpower for the stock, and the total indicates that the fair market value of the United stock on February 1, 1929, the date taxpayer received his rights, was from $57.50 to $61 per share. These values compare favorably with the prices at which the stock was sold to the public by Superpower on January 29, 30, and 31, 1929.

The Board's finding, if such it were, of a $25 fair market value for United stock in January was based upon two considerations which in no way contradict the findings as to fair market value of United stock just set forth in the preceding paragraph. First the Board referred to the determination of the Commissioner in another proceeding in the Bureau that the value of the United securities received by Superpower in exchange for the securities delivered to United was $72,480,000, and that $55,271,325 of that amount should be allocated to the 2,210,853 shares of United common (R. 85):

Secondly, the Board referred to the fact that J. P. Morgan & Co. and Bonbright & Co., subscribed for common stock in United at $22.50 per share. Both of these considerations relate to the time of formation of United which was several weeks before the critical dates here in question. (R. 73–76, 84–85.) The determination of the Commissioner referred to by the Board cannot control in the face of the Commissioner's determination in this proceeding of a deficiency based upon a fair market value of United stock greatly in excess of $25 per share. This determination is presumed to be correct (*Welch* v. *Helvering,* 290 U. S. 111) and is fully supported by non-conflicting evidence of market prices at the critical dates. The subscription prices for United common paid by Morgan and Bonbright, have no relevance to the question of fair market value, since those prices were obtained in private sales between United and its organizers at the time of formation of United. Finally, it should be noticed, in any event, that the two facts referred to by the Board could have little if any relevance to the second distribution of rights to United stock which occurred in May, and no relevance whatever to the distribution of rights to Commonwealth stock.

Concerning the May and June rights, the Board, in its opinion, said (R. 164):

> The stipulated facts do not show the fair market value of United common stock in

May 1929, or of Commonwealth common stock in June and July 1929.

But the record does show that the fair market value of the United and Commonwealth stock in May and June, 1929, was materially greater than the prices at which the two stocks could be obtained under the rights.

The May rights entitled the holders to purchase United common at $30 per share and at the rate of one share of United for each four shares of Superpower. These rights were sold on the New York Curb Exchange, during the option period, at prices ranging from 6⅛ to 11⅜ per right (R. 69–70), or roughly from $25 to $45 for the four rights necessary to acquire one share. Add to these prices the $30 which was payable to Superpower for the stock and the total indicates a fair market value of from $55 to $75 per share.

The June rights entitled the holders to purchase Commonwealth stock at $15 per share and at the rate of one share of Commonwealth stock for each ten shares of Superpower. These rights were sold on the market, during the option period, at prices ranging from 1 1/16 to 1 15/16 per right (R. 72), or, roughly, at from $7.50 to $19 for the ten rights necessary to acquire one share. This would indicate that the fair market value of the Commonwealth stock during the period from June 6 to July 2, 1929, was from $22.50 to $34 per share.

These facts, although incorporated in the Board's findings, were ignored or overlooked by

the Board in its opinion. The prices at which the several series of rights sold on the Curb Exchange obviously represent approximately the difference between the market value of the stocks to which the rights pertained and the subscription prices at which the stock could be obtained by exercising the rights. This may be illustrated by comparing the market prices of United rights on January 29th, 30th and 31st (R. 67) with Superpower's sales of United stock on those same dates (R. 84). The mere fact that the rights were valuable and had an active market conclusively shows that the fair market value of the stock was substantially higher than the price at which it could be obtained under the rights. Otherwise, it would be impossible to account for any market value for the rights themselves.

The Second Circuit, in *Ramapo, Inc.* v. *Commissioner, supra,* disposed of this contention as follows (p. 988):

> These stipulated quotations conclusively establish in our opinion that the stock distributed by Superpower had a fair market value largely in excess of the prices at which it was "sold" to the shareholders. The respondent asserts, however, that the Board made a contrary finding with respect to United stock subject to the January rights, and that this finding is supported by substantial evidence. The finding in question appears as a statement in the opinion in *Pal-*

mer v. *Commissioner,* 32 B. T. A. 550, which was tried and decided with the case at bar. The evidence relied upon is the fact that early in January, 1929, when The United Corporation was formed, the promoters allotted several million shares among themselves at an agreed price of slightly less than $25 per share. What the promoters agreed upon at that time cannot, in our opinion, justify disregarding actual market quotations of numerous transactions at the critical date several weeks later. A finding that the rights had no value cannot be sustained in the face of the additional findings as to market quotations of rights and stock.

* * *

III

THE AMOUNT OF THE DIVIDEND SHOULD BE DETERMINED BY VALUING THE STOCK OR RIGHTS AS OF THE DATE THE RIGHTS WERE RECEIVED BY THE TAXPAYER

The Commissioner of Internal Revenue, in asserting the deficiency, determined the amount of the dividend by valuing the rights as of the dates named in the corporate resolutions for determining the stockholders of record entitled to receive the rights, *viz.,* January 26, May 8, and June 16, 1929. Before the Board of Tax Appeals, the Commissioner asked that the deficiency be increased should the Board find that in determining the amount of the dividend the rights should be valued as of some other date. The Board of Tax Appeals held that

the taxpayer was not in receipt of taxable dividends as a result of the above mentioned transactions and therefore found it unnecessary to pass upon the question.

In petitioning for review before the Circuit Court of Appeals, the Commissioner assigned as error, *inter alia,* the failure of the Board to hold that taxable dividends had been received equal to the market value of the rights when receivable by the taxpayer (R. 183, par. 7), or when received by the taxpayer (R. 183, par. 8, 9). The Circuit Court of Appeals reversed the Board, holding that taxable dividends had been received, but that their amount should be determined by valuing the stock as of the dates the rights were exercised. (R. 192.)

It is our position that the amount of the dividend should be determined by valuing the rights as of the dates they were received by the taxpayer. This is in accordance with the rule laid down in *Avery* v. *Commissioner,* 292 U. S. 210, and *Ramapo, Inc.* v. *Commissioner, supra.* In the *Avery* case the United States Gypsum Company in November declared a dividend payable on or before the 31st day of December following. It was shown that the regular policy of the company was to declare dividends quarterly, in each instance payable on or before the last day of the month, so as to reach the stockholders on the following day. This Court stated that the only question presented for determination was when, within the intendment of the

statutes, the dividends were "received" by the taxpayer. The Commissioner claimed that the dividends constituted income for the years in which they were declared and made payable. The taxpayer claimed that they were taxable for the year in which he received the check. This Court said (p. 215):

> In the disclosed circumstances the dividends cannot properly be considered as cash or other property unqualifiedly subject to the petitioner's demand on December 31st. It was the practice of the Company to pay all dividends by checks not intended to reach stockholders until the first business day of January; there is nothing to show that petitioner could have obtained payment on December 31st, he did not expect this and the practice shows the company had no intention to make actual payment on that day. Nothing indicates that it recognized an unrestricted right of stockholders to demand payment except through checks sent out in the usual way. The checks did not constitute payments prior to their actual receipt. The mere promise or obligation of the corporation to pay on a given date was not enough to subject to petitioner's unqualified demand "cash or other property"; and none of the parties understood that it was.

The rule laid down in that case is directly applicable to the situation here in question. The several resolutions adopted by Superpower provided no means by which a stockholder could

exercise its right to acquire United and Commonwealth stock, except upon surrender of the purchase certificates, and in each case the officers of the company were directed to mail the certificates to the stockholders. In the letter advising the stockholders of the action taken, in connection, for example, with the January rights, the company stated (R. 13), "Purchase Certificates evidencing the above purchase privilege will be mailed to stockholders * * * on or about February 1, 1929", and the necessary deposit of United stock for the purpose of carrying out the purchase options was not made until January 30, 1929 (R. 66). No provision was made whereby the stockholders could have exercised their rights and acquired the United and Commonwealth stock prior to receipt of the rights through the mail nor in any other manner than by surrendering the certificates so received by them together with the sums of money necessary to obtain the stock. Prior to that time, of course, they had an interest in the stock owned by Superpower, the rights in which were subject to distribution under the resolutions adopted, but that interest was identical with the interest of any stockholder in a cash dividend which has been duly declared but not yet paid.

Whether the dividend be regarded as the stock in question, the intangible right to acquire such stock or the purchase certificate evidencing the right, there was receipt, or at least constructive receipt, of the dividend upon receipt of the purchase

certificate, since at that time the rights or shares of stock involved became unqualifiedly subject to the stockholder's demand. Whether he thereupon immediately tendered the purchase certificate, together with the requisite amount of cash, and obtained his certificate of stock or postponed such action until some later date prior to the expiration of the right was entirely within his control.

In the *Ramapo* case, which involved the same rights as are under consideration here, the Second Circuit held that the amount of the dividend should be determined as of the date the respective rights were received. The court said in part (p. 988):

> The remaining question relates to the date as of which the rights shall be valued. Cash dividends are not income to a shareholder until absolutely at his disposal. *Avery* v. *Commissioner*, 292 U. S. 210, 54 S. Ct. 674, 78 L. Ed. 1216. No reason is apparent for distinguishing between cash and property dividends as to the time when they become income. The date when the respective rights became available to the shareholders was when the certificates or warrants were received, and that is the date as of which they should be valued. * * *

We submit on the authority of the *Avery* and *Ramapo* cases that the dividend was unqualifiedly subject to the taxpayer's demands on the date the several issues of rights were received by him. Accordingly, the amount of the dividend should be determined as of those dates.

CONCLUSION

It follows that the decision of the Circuit Court of Appeals, holding that the taxpayer was in receipt of a taxable dividend as a result of the transactions in question, should be affirmed, and should be reversed in so far as it held that the amount of the dividend should be determined as of the date the rights were exercised.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

Nos. 19 and 59.—October Term, 1937.

Bradley W. Palmer, Petitioner, 19 *vs.* Commissioner of Internal Revenue. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 59 *vs.* Bradley W. Palmer.	On Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 8, 1937.]

Mr. Justice Stone delivered the opinion of the Court.

The question for decision is whether a purported sale by a corporation to its stockholders, of shares of stock issued by and acquired from another corporation, the sale being effected by means of an issue to the stockholders of rights to purchase the stock at a named price, is to be treated as a distribution of corporate earnings taxable as a dividend to the stockholders when received, within the reach of §§ 22 and 115 of the Revenue Act of 1928, c. 852, 45 Stat. 791.

In January, 1929, The American Superpower Company, of which petitioner was a stockholder, acquired through consolidation of public utility corporations, in some of which it in turn was a stockholder, a large amount of the securities of The United Corporation, the latter being received in exchange for stock of the consolidated corporations owned by Superpower. The securities received included shares of the preference stock of United, 2,210,583 shares of its common stock, and 1,000,000 rights to subscribe for United common stock at any time for $27.50 a share. United was incorporated January 7, 1929. The consolidation was effected January 12th, when Superpower became entitled to its allotment of the securities. On January 23, 1929, the board of directors of Superpower, pursuant to a plan to strengthen its cash position and to create a wide market for the stock of United, adopted a resolution offer-

ing to its common stockholders of record January 26, 1929, the privilege of purchasing, at $25 a share, one-half share of United for each share of their common stock in Superpower. The privilege was evidenced by negotiable certificates distributed to stockholders about January 31. By their terms they were to become void unless the privilege was exercised by February 15, 1929. On that date petitioner exercised the privilege by purchasing his allotment of 3,198 shares of United at $25 a share. In its books, records and accounts, Superpower treated the transaction as a sale of the United stock, resulting in no change in its net assets or earnings.

The prices received by Superpower for shares distributed to its stockholders represented a substantial profit to it over cost of the securities which it had exchanged for them. It reported the profit in its 1929 income tax return and paid the tax on it for that year. In computing the tax the commissioner in allocating the cost of the three classes of securities received from United by Superpower, found it necessary to determine the value of each class of security when received. He did this by finding the total value of the securities and allocating to the common stock a value of $25 a share. On or about January 9th, bankers who were active in promoting the consolidation purchased from United 400,000 shares of its stock at $22.50 per share. Shortly after the adoption by Superpower, on January 23rd, of the plan for distribution of the United stock, an active market developed on the New York Curb Exchange for the sale of subscription rights. On January 25th, 11,000 rights were sold at prices ranging from 11⅝ to 12⅜, making the cost per share to purchasers of the rights, upon their exercise, about $50. On January 28th, 44,000 of them were dealt in on the exchange at prices ranging from 12⅝ to 17½, with a corresponding cost of the shares of from $50 to $60. On January 29th, 30th and 31st, Superpower sold about 9,200 shares of its United stock on the open market at from $50 to $63 per share.

On May 1, 1929, a like privilege to purchase one-fourth of a share of stock of United at $30 a share for each share of Superpower was extended to the stockholders of the latter, as of May 8, 1929, which petitioner similarly exercised on May 24, 1929. On June 5, 1929, a like privilege was given to the common stockholders of Superpower as of June 18, 1929, to purchase stock of Common-

wealth and Southern Corporation at $15 a share, which petitioner exercised on July 2, 1929.

Petitioner did not, in 1929, sell or otherwise dispose of any of the shares for which he subscribed, or report their receipt in his income tax returns for that year. The commissioner ruled that the rights to subscribe were dividends and assessed a deficiency against petitioner based on their market value on the respective dates when the stockholders were first entitled to exercise them. The cause was heard by the Board of Tax Appeals upon a stipulation of facts which it adopted as a finding and which specified the facts already detailed. The board held that the distributions were sales of the shares by Superpower to its stockholders, not dividends, and reduced the deficiency accordingly. In reaching this decision the board, upon consideration of all the facts and circumstances attending the issue of the rights by Superpower to its stockholders, found that there was no intention to distribute any of its earnings to stockholders and that the transaction was what it purported to be on its face—a sale to stockholders of part of the corporate assets. As a supporting fact it found that the fair value of the common stock of United during January, 1929, was $25 a share. It concluded that the facts as stipulated and as found by it did not show fair market value of the United stock in May, 1929, or of the Commonwealth and Southern stock in June or July of that year. Upon the entire record it was of the opinion that there was no reason to treat the transaction any differently than the parties had treated it, as a sale of a part of the assets of Superpower from which no taxable gain would result before the taxpayer sold or otherwise disposed of the shares.

The Court of Appeals for the First Circuit reversed, holding that the distributions were taxable dividends measured by the difference between the value of the several allotments of shares on the respective dates when the rights were exercised and the prices paid for them. 88 F. (2d) 559. In reaching this conclusion the court recognized that the board had found the January, 1929, value of the stock of United to be $25 a share. But it thought that the board in making the finding had disregarded the substantial prices at which the rights were sold pending their exercise, denying to them persuasive weight because it had mistakenly assumed that the

purported sale could not be treated as a dividend unless there was intention to distribute the corporate earnings. The court held that what was done, and not what was intended, was the decisive factor and as there was substantial evidence that the stock, when distributed, was worth more than the price received, there was a distribution of corporate assets from earnings, taxable to stockholders as a dividend. It accordingly remanded the cause to enable the board to ascertain the value of the distributed shares on the dates when the rights were exercised (February 15, 1929, May 24, 1929, July 2, 1929).

Both the taxpayer and the commissioner petitioned for certiorari, the one challenging the ruling that the distributions were dividends, and the other assigning as error the failure to hold that the critical dates for fixing the value of the dividends for taxation were either those when the rights were received by the stockholders or when the stockholders first became entitled to exercise them, rather than the times when they were actually exercised. We granted certiorari, 301 U. S. —, because of the importance of the questions in the administration of the revenue laws, and the doubts which have been raised as to their appropriate answers by the varying opinions of the circuit courts of appeals. Compare the opinions below, *Ramapo, Inc.* v. *Commissioner,* 84 F. (2d) 986 (C. C. A. 2d) and *Commissioner* v. *Mayer,* 86 F. (2d) 593 (C. C. A. 7th) with *Helvering* v. *Bartlett,* 71 F. (2d) 598 (C. C. A. 4th) and *Commissioner* v. *Cummings,* 77 F. (2d) 670 (C. C. A. 5th).

By §§ 111, 112 and 113 of the Revenue Act of 1928, profits derived from the purchase of property, as distinguished from exchanges of property, are ascertained and taxed as of the date of its sale or other disposition by the purchaser. Profit, if any, accrues to him only upon sale or disposition, and the taxable income is the difference between the amount thus realized and its cost, less allowed deductions. It follows that one does not subject himself to income tax by the mere purchase of property, even if at less than its true value, and that taxable gain does not accrue to him before he sells or otherwise disposes of it. Specific provisions establishing this basis for the taxation of gains derived from purchased property were included in the 1916 and each subsequent revenue act and accompanying regulations.

Section 22 of the Revenue Act of 1928 includes "dividends" in "gross income", which is the basis of determining taxable net income and § 115 defines "dividend" as "any distribution made by a corporation to its ~~stockholders~~ shareholders, whether in money or in other property, out of its earnings or profits." While a sale of corporate assets to stockholders is, in a literal sense, a distribution of its property, such a transaction does not necessarily fall within the statutory definition of a dividend. For a sale to stockholders may not result in any diminution of its net worth and in that case cannot result in any distribution of its profits.

On the other hand such a sale, if for substantially less than the value of the property sold, may be as effective a means of distributing profits among stockholders as the formal declaration of a dividend. The necessary consequence of the corporate action may be in substance the kind of a distribution to stockholders which it is the purpose of § 115 to tax as present income to stockholders, and such a transaction may appropriately be deemed in effect the declaration of a dividend, taxable to the extent that the value of the distributed property exceeds the stipulated price. But the bare fact that a transaction, on its face a sale, has resulted in a distribution of some of the corporate assets to stockholders, gives rise to no inference that the distribution is a dividend within the meaning of § 115. To transfer it from the one category to the other, it is at least necessary to make some showing that the transaction is in purpose or effect used as an implement for the distribution of corporate earnings to stockholders.

The facts stipulated and the finding of the fair market value of the United stock at the time of the adoption of the first plan for its distribution abundantly sustain the board's conclusion that the transaction—in form a sale—was not intended to be the means of a distribution of earnings to stockholders. There may be cases in which market quotations, after the subscription rights have been issued, are persuasive evidence of value as of the time when the plan was adopted, and hence of its purpose and probable effect. But we cannot say that the board here, in finding the value of the shares of the newly organized United as of the time of adoption of the first plan, did not consider the market prices of the rights. The findings are inferences which the board was free to draw from all the facts and circumstances disclosed by the record. Such a

determination of fact is not to be set aside by a court even if upon examination of the evidence it might draw a different inference. *Helvering* v. *Rankin*, 295 U. S. 123, 131, 132; *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37. We accept the findings as at least establishing that the plan was adopted by Superpower in good faith as a means of effecting a sale of its assets to stockholders at fair market value. Hence the issue for decision, in so far as the first allotment of stock is concerned, is narrowed to the question of law whether the commitment of Superpower, by formal action of its board, to the sale of United stock at its then fair market value and the ensuing distribution to stockholders is taken out of the category of sales and placed in that of dividends by the fact that, pending execution of the project, rights to subscribe sold on the exchange at substantial prices, or that the stock itself sold at prices substantially above the stipulated purchase price.

First. The mere issue of rights to subscribe and their receipt by stockholders, is not a dividend. No distribution of corporate assets or diminution of the net worth of the corporation results in any practical sense. Even though the rights have a market or exchange value, they are not dividends within the statutory definition. Cf. *Miles* v. *Safe Deposit & Trust Co.*, 259 U. S. 247; *Helvering* v. *San Joaquin Co.*, 297 U. S. 496; *Helvering* v. *Bartlett*, *supra*. They are at most options or continuing offers, potential sources of income to the stockholders through sale or the exercise of the rights. Taxable income might result from their sale, but distribution of the corporate property could take place only on their exercise. The question, then, is whether the distribution which results from the exercise of the rights must be regarded as a dividend if the reasonable value of the property at the time of exercise is more than the purchase price.

Second. We think that a distribution of assets by a corporation to its stockholders by means of a sale, to which it is committed by appropriate corporate action at a time when their sale price represents their reasonable value, is not converted into a dividend by the mere circumstance that later, at the time of their delivery to stockholders, they have a higher value. The meaning of § 115 must be sought in the light of the situations to which it must be applied. It does not purport to withdraw corporations and their stockholders wholly from the operation of §§ 111, 112 and 113, taxing the profits of purchasers. It cannot be taken to withhold from corporations

the power at their own election to effect, by workable means, sales of their assets to stockholders at fair value, subject to that incidence of taxing statutes which usually attends sales. The distribution contemplated and defined by it as a dividend is one to be effected by corporate action. Hence, in determining whether a given transaction is "sale" or "dividend", the corporate action which results in one or the other must be scrutinized in the light of the circumstances at the time when the action is taken, and of the conditions under which in practice it must be taken.

The only feasible method by which a corporation of large membership can effect a sale of its assets to stockholders is by tendering to them rights to subscribe, a method whose indispensable first step is the adoption, by appropriate corporate action, of the terms of the offer. Between the dates of the first step and of subscription a substantial period of time must elapse, during which the rights may, and often do, become the subject of violent market fluctuations. Any vendor who offers property for sale at a named price similarly carries the burden of risk that the property may increase in value between offer and acceptance. If the sale is by executory contract he also carries the risk between promise and performance. It is an inseparable incident of every sale except those in which conditions admit of payment for the property simultaneously with its tender for sale, a procedure which may not be available to a corporation seeking to sell its property to stockholders.

It is a solecism to speak of a corporation as distributing its profits for the sole reason that, after it has unavoidably assumed that risk in order to effect a sale of its property to stockholders at a fair price, the property increases in value. Price, which in the present case is decisive of the issue, must be determined in the light of the situation existing when price is fixed. If the option price is fair when fixed the transaction is a tender for a sale and not for a distribution of profits—a dividend as defined by § 115. If, pending execution of the plan, there were no change in value of the stock the transaction would throughout concededly retain its character as a sale. Its character is not altered by the fluctuations of a speculative market, after the corporate action which defines the character of the transaction has been taken.

When the corporation has committed itself to a sale of its assets to stockholders at present market value the effect on its bal-

ance sheet is the same as in the case of other vendors who in various ways assume the risk of rising prices pending the consummation of the sale. In every case purchasers may, as a result of market change, acquire property at less than its value at the date of acquisition. But in the case of the corporation it does not follow that there has been a distribution of its profits. It can hardly be said that profits accrue to a corporation from a fortuitous gain in market value, the benefits of which it has relinquished before the gain occurs. Distribution of profits is neither the purpose nor effect of the action taken by the corporation and there is no adequate basis for saying that the transaction to which the directors committed their corporation was the distribution of earnings, and hence a dividend rather than a fairly conducted sale of corporate property with all the incidents which usually attend a sale when the price is fixed in advance of performance. It is decisive of the present case, so far as the first allotment of United shares is concerned, that distribution of corporate assets, effected by the sale, was not intended to be a means of distributing earnings, and that the price when fixed represented the fair market value of the property to be distributed.

There has been no finding, either by the commissioner or the board, of the fair market value of the United stock in May or of the Commonwealth & Southern in June, the months when the plans for the second and third allotments of the shares were adopted. The finding of the board that the facts as stipulated were not sufficient to establish fair market value of the shares on those dates furnish sufficient support for its conclusion that there was no basis for treating the transactions, which were on their face sales, as distributions of earnings and hence dividends as defined by § 115.

The writ in No. 59 is dismissed and in No. 19 the judgment is

Reversed.